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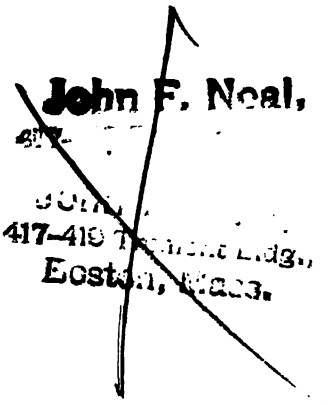

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. WALBRIDGE A. FIELD, CHIEF JUSTICE.
HON. CHARLES ALLEN.
HON. OLIVER WENDELL HOLMES.
HON. MARCUS P. KNOWLTON.
HON. JAMES M. MORTON.
HON. JOHN LATHROP.
HON. JAMES M. BARKER.

ATTORNEY GENERAL.

HON. HOSEA M. KNOWLTON.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

CHARLES A. KENNESON, administrator, *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. January 18, 1897. — February 25, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Personal Injuries — Loss of Life — Defect which Employee ought to have known — Law and Fact — Expert.

At the trial of an action against a street railway company for causing the death of a motorman, it appeared that when the electric car upon which he was employed had reached its destination the conductor went to the other end, shifted the trolley and pushed in the fender, and that the motorman took off the motor handles and gong tapper and went to the end which was now the front of the car, and was seen to stoop down and take hold of the fender. Shortly after the car started, and he was caught under the wheels and fatally injured. The cause of the starting was wholly uncertain. *Held*, that the case was rightly taken from the jury.

The finding of a judge presiding at the trial, that a witness was not qualified to express an opinion, is not open to revision by this court, the examination of the witness not having been reported.

TORT, under the employers' liability act, St. 1887, c. 270, for the conscious suffering and for causing the death of John H. Kenneson, the plaintiff's intestate. Trial in the Superior Court, before *Gaskill*, J., who, at the close of the plaintiff's evidence,

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directed a verdict for the defendant; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

J. A. McGeough & R. G. McClung, for the plaintiff.

W. B. Sprout, for the defendant.

HOLMES, J. This is an action for running over the plaintiff's intestate with an electric car on which he was employed as motorman. The car had reached its destination, Somerville; the conductor went to the Somerville end, shifted the trolley, and pushed in the fender. The deceased took off the motor handles and gong tapper, went to the other end, which now would be the front of the car, and was seen to stoop down and to take hold of the fender. Very shortly afterward the car started, and he was caught under the wheels and fatally injured. What caused the car to start is wholly uncertain. See *Ross* v. *Pearson Cordage Co.* 164 Mass. 257. It is suggested that the car was defective, but there is no satisfactory evidence that it was, or, if it was, that the defect was or ought to have been known to the defendant, or that it was of such a nature as to be likely to cause the start. It is equally or more likely that the car moved, after the trolley was turned and readjusted, because the electricity had not been fully shut off, or because the deceased in some way moved the cable under the car which let on the power. The presiding judge was right in taking the case from the jury.

The examination of the conductor as to his competency to say what a trouble with the electric handles indicated is not reported.* We cannot revise the judge's finding that the witness was not qualified to express an opinion. *Commonwealth* v. *Sturtivant*, 117 Mass. 122, 137.

Exceptions overruled.

* The conductor testified that on the same trip out, at Kenneson's request, he turned the motor handles on the forward end a little, and the car jumped forward. The plaintiff's counsel then asked the witness what the trouble with the electric handles indicated. The judge, having inquired of the witness his knowledge of and experience with electricity as a motive power for running cars and the regulation of it by mechanical appliance, found that he was not qualified to express an opinion, and excluded the evidence.

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TIMOTHY J. HARTNETT *vs.* JAMES McMAHAN.
B. ELIZABETH HARTNETT *vs.* SAME.
JAMES McMAHAN *vs.* TIMOTHY J. HARTNETT.

Middlesex. January 18, 1897. — February 25, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Assault and Battery — Evidence.

In actions for an assault and battery, one by A. against B., and the other by B. against A., which were tried together, B. testified that A. struck him when he was down, and during the altercation between them a crowd collected; and that, while A. was on top of his back, C., a bystander, asked him to get off and let B. alone. *Held*, that the evidence was rightly admitted.

THREE ACTIONS OF TORT, each for an assault and battery. At the trial of the cases together in the Superior Court, before *Fessenden*, J., the jury returned verdicts for McMahan; and the Hartnetts alleged exceptions to the admission of certain evidence, the nature of which appears in the opinion.

S. H. Dudley, for the Hartnetts.

J. B. Goodrich, for McMahan.

KNOWLTON, J. These three cases were tried together, and in two of them each of two persons sought to recover from the other for an alleged assault. In the third, another person sought to recover from one of them for an assault upon her at the same time. McMahan testified that Hartnett struck him when he was down, and that during their altercation many persons gathered about, and that, while Hartnett was on top of his back, one White, a bystander, asked Hartnett to get off and let him alone. Hartnett's exception to the testimony of what White said presents the only question in the cases.

It is quite clear that White's remark, considered as a declaration, was not competent evidence to prove the truth of anything implied by it, but it does not follow that it was wrongly admitted. It was introduced in connection with an account of the conduct of both parties immediately before and after it, to which it related, and the last part of which might have been affected by it. It was heard by both of them, and as an occurrence closely con-

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nected with and perhaps affecting conduct, the nature of which was the substance of the issue, we think it well might be put in evidence as a part of the controversy which was under investigation by the court. It was at least an accessory of it, and a kind of side light without which the picture would be incomplete. In the absence of anything to show that an improper use was made of the evidence, the entry must be, *Exceptions overruled.*

DANIEL W. HORNE & another *vs.* W. K. NIVER & another.

Middlesex. January 18, 1897. — February 25, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Contract — Offer — Acceptance.

If an offer to sell goods calls for an immediate reply by telegraph, an answer by mail two days later is not in time to constitute a good acceptance of the offer.

CONTRACT, for breach of an agreement to sell a certain quantity of coal. Trial in the Superior Court, without a jury, before *Blodgett*, J., who found for the defendants; and the plaintiffs alleged exceptions. The facts material to the point decided appear in the opinion.

W. H. Bent, for the plaintiffs.

B. L. M. Tower, for the defendants.

HOLMES, J. This is an action on an alleged contract to sell four hundred tons of coal at two dollars and a half a ton. On July 17, 1895, the defendants wrote to the plaintiffs, offering "a very low figure on a small lot of our Columbia coal from Salem." The letter continued, "We beg to quote you $2.50 on cars at that place, and should you deem it wise to favor us with an order of 5 or 600 tons, kindly wire us at our expense on receipt of this." On July 19 the plaintiffs replied, ordering four hundred tons. The presiding judge, against the plaintiffs' request and exception, ruled that the answer was not in time to constitute a good acceptance, and found as a fact that the offer was not accepted according to its terms. The ruling was clearly right as applied to

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the written offer alone, since the offer did not purport to extend beyond the time for a reply by telegraph; *Eliason* v. *Henshaw*, 4 Wheat. 225; *Maclay* v. *Harvey*, 90 Ill. 525; and so far as appears the finding was justified. *Minneapolis & St. Louis Railway* v. *Columbus Rolling Mill*, 119 U. S. 149, 152. There was conflicting evidence of some conversation between the two letters, which is relied on as showing that the offer was treated as open; but as the judge found that the only oral agreement made was conditional upon the coal not having been all disposed of, as in fact it had been, the talk cannot help the plaintiffs.

The finding just mentioned made the plaintiffs' other requests for rulings as to a verbal extension of time or consent to an acceptance on July 19 immaterial. *Exceptions overruled.*

DAVID L. WEBSTER & others *vs.* INHABITANTS OF MELROSE.

Middlesex. January 19, 1897. — February 25, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Land Damages — Instructions — Trial — Exceptions.

In this case the court were of opinion that the ruling requested was given, and that no exception was open.

PETITION to the Superior Court, under Pub. Sts. c. 52, §§ 15, 16, for a jury to assess the damages caused to the petitioners by lowering a highway in the respondent town. At the trial, before *Fessenden*, J., the jury returned a verdict for the respondent; and the petitioners alleged exceptions. The facts appear in the opinion.

W. B. Stevens, for the petitioners.

F. S. Hesseltine, for the respondent.

HOLMES, J. This is a petition for damages caused by lowering the highway on part of the petitioners' land. The work in question was done in 1895. The order relied on to make the town responsible was passed in 1891, and the first question was whether the work was done in pursuance of that order, or

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whether the work contemplated in 1891 was finished in 1891. This was put to the jury, and they found that the contemplated work was finished in 1891. Another question was whether the grade had been changed by the work of 1895, the parties not being agreed as to what the grade was at that time. At the end of the charge this ruling was asked: "If the grade of the street opposite the petitioners' premises had remained the same for forty years, this fact should be taken into consideration by the jury in determining the real grade of the same." This was refused at first; and then the counsel for the petitioners asked for an exception, at the same time expressing a doubt as to his right to it, which, in view of the time of the request and the circumstances, was intelligible. *Ela* v. *Cockshott*, 119 Mass. 416, 418. But thereupon the judge said: "I have instructed the jury and will repeat this, in order to save any question about it, that in determining what the true grade of the street was, gentlemen, you may bear in mind what the condition of the street had been as described in this testimony." Nothing more was said, and evidently the judge was warranted in supposing that the petitioners were satisfied, as his language showed him to intend that they should be. His instruction covered what the petitioners asked. The petitioners did not ask a ruling to the effect of their argument before us, that forty years' continuance would establish a grade by prescription, but only that the continuance was to be considered by the jury. We do not perceive that the petitioners have anything to complain of, or why the jury's answer to the question put to them did not make the request immaterial.

Exceptions overruled.

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ELIZABETH A. CURRY *vs.* LASELL SEMINARY COMPANY.

Middlesex. January 19, 1897. — February 25, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Action — Construction of Contract under which Pupil was placed in Boarding School.

If B. refuses to allow A.'s daughter to remain longer in B.'s boarding school unless A. will accept B.'s construction of the contract under which A. placed her daughter as a pupil in the school, which construction is correct, that the officers of the school have absolute discretion to determine when a pupil shall be permitted to be absent, and A. refuses to accept this construction and takes her daughter away, she cannot maintain an action against B. to recover the money which she has advanced for a half year's board and tuition.

CONTRACT, to recover damages for an alleged breach of an agreement to furnish board and tuition to the daughter of the plaintiff. Trial in the Superior Court, before *Blodgett*, J., who, at the close of the evidence offered by the plaintiff, directed a verdict for the defendant; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

A. H. Russell, for the plaintiff.

C. B. Barnes, Jr., for the defendant.

KNOWLTON, J. The plaintiff placed her daughter as a pupil in the boarding school of the defendant corporation, under a contract to leave her there to be boarded, instructed, and cared for through the school year. At the end of six weeks, on Saturday, the plaintiff asked that her daughter be permitted to spend the following Sunday and Monday with her, away from the school. Up to this time the daughter had already been allowed on application to the preceptress, to spend three Sundays with her mother since entering the school, and the plaintiff's request on this occasion was denied. She insisted, took her daughter away with her, and kept her until the afternoon of the following Monday. Thereupon the defendant refused to allow the daughter to remain longer in the school unless the plaintiff would accept the defendant's construction of the contract, which was that the officers of the school had absolute discretion to deter-

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mine when a pupil should be permitted to be absent. The plaintiff refused to accept this construction, took her daughter away, and brought this action to recover the money which she had advanced for a half year's board and tuition. Before the beginning of the school year the plaintiff signed and forwarded to the defendant a paper as follows:

"Application. I hereby apply for a place in Laselle Seminary for Belle A. Curry for the year beginning in September, 1894. I have read in the Laselle catalogue the financial and other conditions on which pupils are received, and consider myself bound by them. Mrs. S. S. Curry, parent. Said Belle A. Curry is twenty years of age, is in good health, has been attending Northwestern University, and intends to take a regular course."

The plaintiff testified that the catalogue had been sent to her some time before she made this application, and that she had read it. Under the heading "Regulations" in the catalogue are these words: "Payment is to be as stated on the next page, and no deduction is made for absence except in cases of protracted illness, when one half the price of board (not tuition) is refunded. . . . Parents or guardians who place pupils here are understood to accept the conditions as defined in this catalogue." The next page of the catalogue called for an advance payment of three hundred dollars, which the plaintiff made.

The only question in this case is which of the parties was right in construing the contract. A disagreement had arisen between them as to whether the daughter should be permitted to go away from the school frequently to spend Sunday with her mother, and the question was which of them, under their contract, had a right to decide. If there had been no express contract, the plaintiff, by placing her daughter as a pupil in the school, would have impliedly agreed that she should obey all reasonable rules and regulations of the school. This is the duty of every pupil who attends a public school, and a parent has no right to have his child remain in a public school if he persists in wilfully disregarding such reasonable rules. *Sherman* v. *Charlestown*, 8 Cush. 160. *Spiller* v. *Woburn*, 12 Allen, 127. *Russell* v. *Lynnfield*, 116 Mass. 365. Regulations requiring constancy in attendance from the scholars have often been held to be reason-

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able, and the desire of the parent frequently to keep his child at home must yield to the interests of all the other scholars in the school of which his child is a member. *Ferriter* v. *Tyler*, 48 Vt. 444. *Burdick* v. *Babcock*, 31 Iowa, 562. *North* v. *University of Illinois*, 137 Ill. 296.

In the present case the defendant inserted in its catalogue under the heading "To Parents," and the sub-heading "Vacation, Visits, etc.," the following: "Every student is needed at the first hour of the first, and until the last hour of the last, day of the year. Every irregularity is injurious, embarrassing the irregular one and others. Frequent 'going home to spend Sunday' is not compatible with good scholarship. You are therefore expected not to allow your daughters to be absent from school except at the regular recesses." This last sentence, in connection with those that preceded it, is a notification to parents that their daughters are to be kept constantly in the school except at the regular recesses, or at times when the officers of the school choose to permit absences. This is not an unreasonable regulation, nor is this construction of the language an unnatural one. It is obvious that frequent absences of some of the pupils in a boarding school for young ladies would not only be distracting to those who were absent, but would tend to produce discontent and demoralization among those who remained at the school. Practically there would be no difficulty from yielding this authority to teachers, for they are usually ready enough to regard the wishes and retain the good will of parents. In making such a contract, no parent would feel that there was any danger of the abuse of the authority by refusing to grant to the pupil permission to be absent in such a case as the death or very dangerous illness of a father, or mother, or brother, or sister. It is inconceivable that a teacher would willingly subject herself to general condemnation in such a case.

Besides, the language of the bill of exceptions is to be interpreted in reference to the nature of the controversy between the parties. They were considering such cases as ordinarily arise, in which there may reasonably be a difference of opinion in regard to the propriety of a temporary absence. It is at least doubtful whether, in favor of an excepting party, we should construe this contention of the defendant at the interview with the

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plaintiff to refer to such an extraordinary case as that above supposed.

We are of opinion that the defendant was not bound to allow the plaintiff's daughter to remain in the school, unless with the understanding that she should not be absent without the permission of the officers of the school. *Exceptions overruled.*

WILLIAM S. BRITTAIN *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. January 20, 1897. — February 25, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Employers' Liability Act — Superintendence — Fellow Servant — Discretion of Judge as to reopening Case.

An action cannot be maintained for personal injuries occasioned to an employee by one who was acting as a fellow servant and not as a superintendent.

It is within the discretion of the judge presiding at the trial to decline to reopen a case for the further examination of a witness.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendant's employ.

At the trial in the Superior Court, before *Lilley*, J., it appeared in evidence that the plaintiff, while employed in the paint shop of the defendant, was engaged with one Hadley, the alleged superintendent, in shifting a car to the elevator for the purpose of taking it out of the shop; that Hadley was operating the car as a motorman, while the plaintiff held and managed the trolley rope; and that, by the movement of the car, the plaintiff was caught between it and the side of the building.

In the discussion of a request of the defendant that the judge direct a verdict for the defendant, there was a dispute as to what the plaintiff had testified about Hadley's moving his hands while the plaintiff was in front of the car, the plaintiff's

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attorney claiming that the plaintiff had testified that Hadley moved his hands and the brake and reverser, and ran the car on to the plaintiff. But on reading the stenographer's report of the evidence, it was found that he had not so testified. Thereupon the plaintiff's attorney asked to reopen the case, and place the plaintiff upon the stand, for the reason that the attorney had misunderstood the answer. The judge refused the request, and the plaintiff excepted. At the request of the defendant, the judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

P. B. Runyan, for the plaintiff, submitted the case on a brief.

W. B. Sprout, for the defendant.

ALLEN, J. According to the plaintiff's testimony, the accident happened in consequence of the starting of the car, and this he contended was in consequence of Hadley's negligence. Assuming this to be so, it is quite plain that Hadley was not exercising superintendence, but was merely acting as motorman, or as a fellow servant of the plaintiff. There was no evidence tending to show that the plaintiff's injury was received by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, as required by St. 1887, c. 270, § 1, cl. 2. *Cashman* v. *Chase*, 156 Mass. 342. *Fitzgerald* v. *Boston & Albany Railroad*, 156 Mass. 293. *Adasken* v. *Gilbert*, 165 Mass. 443.

It was within the discretion of the court to decline to reopen the case for further examination of the witness. The matter sought to be inquired about was immaterial, upon the real question in the case.

Exceptions overruled.

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JOHN SAMUELIAN *vs.* AMERICAN TOOL AND MACHINE COMPANY.

Suffolk. January 20, 1897. — February 25, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Master and Servant — Action.

If a servant of A. is sent by his master to repair machinery belonging to B., who directs him what to do, and while so engaged he is wholly under the control of B., although the latter relies largely upon his skill and experience, he is for the time the servant of B., and not of A., and if through his negligence another servant of B. is injured, an action for such injury cannot be maintained against A.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. Trial in the Superior Court, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that the plaintiff was employed by the Collins Press Corporation as a press feeder at its establishment in Boston; that the press upon which the plaintiff was working got out of order, whereupon he was put to work upon another press; that one Francis A. Guell, a machinist, who was in the employ of the defendant, was sent by the latter to the Collins Press Corporation; and that, after Guell had substantially completed the repairs of the press, the plaintiff returned to it, and proceeded, after Guell had oiled the parts repaired, to oil the plunger, whereupon Guell started the press in motion without giving notice to the plaintiff, as the latter testified, and he sustained the injuries complained of. There was no evidence offered by the plaintiff that Guell was working under the direction of any servant of the Collins Press Corporation. There was some testimony tending to show that Guell was negligent in starting the press; and that the plaintiff was in the exercise of due care. There was also testimony that a press feeder's duties are to feed the sheets of paper, one at a time, into the press, to start and stop the press as occasion required, and to keep the same properly oiled; and that a pressman was employed, who controlled

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the general operation of the press, and saw that it was properly working.

At the conclusion of the plaintiff's evidence, the defendant requested the judge to rule that the action could not be maintained, on the ground that the negligence relied on was the negligence of a fellow servant; but the judge declined so to rule at that time, and the defendant proceeded to put in its evidence.

Edward J. Eichler, employed in the office of the defendant corporation, testified that, on the day of the accident, he received a message from the Collins Press Corporation to send a man; and that, in consequence of the message, Guell was sent there. On cross-examination, he testified that the defendant charged the Collins Press Corporation for Guell's time at fifty cents an hour, reckoning from the time he left the shop until he got back.

Guell testified, in substance, as follows: "I received an order to go to the Collins Press Association from Mr. Roberts, the foreman of the defendant corporation. There was a stud given me which broke in the press. When I got to the Collins Press building, the foreman, Mr. Noyes, set me to work. He showed me the press that needed repairing. He said he would like to have the press fixed. I did the part that I went there to do, put the stud in, and set the press so as to run. He did not tell me exactly what he wanted done; he told me he wanted that press fixed. I fixed what is called the shoes, and the double rack. I think I worked there about seven hours. I did not do anything to the plunger, or to the parts near the plunger, or directly connected with it. There was no other person from the defendant corporation present while I was at work, or giving me any instructions what to do, or how to perform the repairs."

On cross-examination, the witness testified that he was a skilled machinist; that when he was sent to look after a job on a press like this, he knew what the matter was with it after he looked at it; that when he saw something the matter with a press he knew what it was, and when a general order was sent to his company to send a man they sent him, because he knew how to do a piece of work without any direction from anybody;

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that the plaintiff did not do any of the machinist's work in repairing that press; that a machine had to be oiled in a great many places before it would work well; that he did not regard it as a part of his duty to oil the plunger; and that he had not got through work when the accident happened, and his tools were still around there.

Benjamin N. Noyes, foreman of the Collins Press Corporation at the time of the accident, testified, in substance, that he saw Guell on the day he came there to make repairs; that he directed him to the press, and explained to him the repairs that were to be made; that nobody came with him from the defendant; and that Guell did what he directed him to do.

At the close of the evidence, the defendant renewed its request that the judge should order a verdict for the defendant. The judge then asked the defendant's counsel, "Is it your theory that Guell was at work for the Press Company?" and he replied in the affirmative. The judge thereupon ruled that there was no evidence which would warrant a verdict for the plaintiff; and ordered the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

A. M. Lyman, for the plaintiff.

G. E. Smith, (*W. F. Garcelon* with him,) for the defendant.

KNOWLTON, J. The only ground on which the plaintiff seeks to hold the defendant liable is that Guell was engaged as a servant of the defendant in the work in which he is alleged to have been negligent. The burden of proof was on the plaintiff to show this. There was no evidence to sustain this burden. Upon the undisputed testimony, Guell was repairing machinery of the Collins Press Corporation, and the defendant had no other connection with the business than to send him to do, in the service of this corporation, under the direction of its agents, whatever they wanted him to do in repairing machinery. There was no evidence that tended to contradict the testimony that, while he was engaged in this service, he was under the control of these agents, who could at any moment tell him to stop or go forward with the work, and could insist that it should be done in one way or another, as they should think best. The fact that they relied largely upon his skill and experience did not affect their absolute right to control him in everything he did upon their

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machinery. He was therefore, for the time, the servant of the Collins Press Corporation, and not of the defendant.

The law in cases of this kind has often been considered by this court, and is well settled. In *Ward* v. *New England Fibre Co.* 154 Mass. 419, is this language: "The defendant corporation contends that, although he was in the general service of Manchester and Ward and received his pay from them, he consented that they should set him to do the defendant's work, to be paid for by the defendant according to the time spent upon it, and to be done according to specifications prepared by the defendant's superintendent, and to be managed and directed by the defendant during its progress. If this were so, he would be the defendant's servant in the particular business, notwithstanding that in a general sense he was a servant of Manchester and Ward." In *Coughlan* v. *Cambridge*, 166 Mass. 268, 277, the court says: "It is well settled that one who is the general servant of another may be lent or hired by his master to another for some special service, so as to become as to that service the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired." *Hasty* v. *Sears*, 157 Mass. 123, is a case very similar to the one at bar. See also *Kimball* v. *Cushman*, 103 Mass. 194; *Johnson* v. *Boston*, 118 Mass. 114; *Morgan* v. *Smith*, 159 Mass. 570.

Exceptions overruled.

MARY HOLBROOK *vs.* HENRY O. ALDRICH & another.

Suffolk. January 25, 1897. — February 25, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Personal Injuries — Child — Trespass — Action.

A child less than seven years old entered a shop with her father, who was going to make a purchase. She intended to buy some candy, but in the first place accompanied him to a part of the shop at some distance from the candy counter and near to a coffee grinder. He let go her hand to get his money, and she went over to the coffee grinder, put her hand up the spout out of which the

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ground coffee came, hoping to get some whole kernels, and lost her fingers. *Held*, that she could not maintain an action against the shopkeeper for her injuries.

TORT, for personal injuries occasioned to the plaintiff while in the shop of the defendants. Trial in the Superior Court, before *Mason*, C. J., who directed the jury to return a verdict for the defendants; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

J. R. Thayer, (*C. G. Chick* with him,) for the plaintiff.

C. T. Russell, (*G. C. Dickson* with him,) for the defendants.

HOLMES, J. This is an action for loss of the plaintiff's fingers, which were cut off by a coffee grinder in the defendants' shop. The plaintiff, a minor less than seven years old, entered the shop with her father, who was going to make a purchase. She intended to buy some candy, but in the first place accompanied her father to a part of the shop at some distance from the candy counter and near to the coffee grinder. He let go her hand to get his money, and she went over to the coffee grinder, put her hand up the spout out of which the ground coffee came, hoping to get some whole kernels, and lost her fingers. The judge directed a verdict for the defendants; and the plaintiff excepted.

We are of opinion that the direction was right. If the decision were to be put on the narrowest possible ground, it might be said that at the moment of the accident the plaintiff was not within the scope of the defendants' implied invitation, and therefore was entitled to no protection against such possibilities of harm to herself. But even if she had been buying coffee we should regard the rule as the same. The defendants' invitation in that case would have bound them to due care for the safety of those walking in the neighborhood while simply moving about. But it would not have bound them to look out for or to prevent wrongful acts, on the ground that the acts if done might hurt the actor. Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen. *McEachern*

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v. *Boston & Maine Railroad*, 150 Mass. 515. *Daniels* v. *New York & New England Railroad*, 154 Mass. 349. *Gay* v. *Essex Electric Street Railway*, 159 Mass. 238. The case is similar in principle to *McGuiness* v. *Butler*, 159 Mass. 233, and to *Mangan* v. *Atterton*, L. R. 1 Ex. 239, which, notwithstanding the observations in *Clark* v. *Chambers*, 3 Q. B. D. 327, has been cited in this Commonwealth repeatedly as unquestioned law. See also *Hughes* v. *Macfie*, 2 H. & C. 744. In *Moynihan* v. *Whidden*, 143 Mass. 287, which would have to yield to *McGuiness* v. *Butler*, if there were a conflict, it seems to have been assumed that the plaintiff's touching the rope was not tortious. *Exceptions overruled.*

EDWARD STEESE & another, executors, *vs.* ROBERT JOHNSON.

Norfolk. December 11, 1896. — February 26, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Forcible Entry and Detainer — Service of Notice.

In an action on Pub. Sts. c. 175, to recover possession of premises occupied by the defendant under a lease, to whom a notice to quit for non-payment of rent is delivered for service to an officer, whose return recites that he left an attested copy of the notice at the defendant's last and usual place of abode, if the officer testifies that he went to the house occupied by the defendant, and, in response to his ringing of the door bell, a woman opened a window and asked him what he wanted, to which he replied that he had a notice for the defendant, and she said she would give it to him, and he then handed her a copy of the notice given him to serve, the jury will be justified in finding that the woman was the wife or servant of the defendant; and, if she was either, this constitutes a sufficient service.

ACTION on Pub. Sts. c. 175, to recover possession of certain premises in Brookline.

At the trial in the Superior Court, on appeal, before *Blodgett*, J., the plaintiffs offered evidence which tended to show that on June 7, 1895, the defendant was in occupation of the premises in question, as the tenant of the plaintiffs under a written lease, and was then owing them several months' rent which had accrued under the lease; and that on that day a notice to

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quit for non-payment of rent, signed in behalf of the plaintiffs by their attorney, was delivered to W. Y. Gross, a constable of Brookline, to serve on the defendant. The notice and the officer's return thereon were put in evidence by the plaintiffs. The return recited that he "served a true attested copy of this notice on the within named Robert Johnson, by leaving the same at his last and usual place of abode."

Gross was not present in court as a witness, but the following written agreement, signed by the attorneys for the plaintiffs and the defendant, was put in by the plaintiffs with the defendant's consent:

"It is hereby agreed that Willard Y. Gross, if present, would testify, if competent, that he is a constable residing in the town of Brookline; that on June 7, 1895, early in the evening, he went to a certain house on Waverly Street, Brookline, which it is agreed was the house of which plaintiffs seek to recover possession in this action; that said house was occupied by Robert Johnson; that he rang the bell, and that, in response thereto, a lady with a little child came to a window beside the door, and opened the window; that the lady asked him what he wanted, and he said he had a notice for Mr. Johnson; that she said she would give it to him, and he then handed her a true copy by him attested of the notice which the plaintiffs have offered in evidence; that he had seen Mrs. Johnson once before, and thinks this lady was Mrs. Johnson, but that it was about dusk when he went to the house, and he could not swear positively that the lady was Mrs. Johnson."

No other evidence whatever was introduced in respect to the service of the notice.

The judge instructed the jury that, upon the foregoing evidence, they would be warranted in finding that the officer delivered the notice either to the wife of the defendant or his servant, and that, if they were satisfied that he delivered it to either, this would be a good and sufficient service; and the defendant excepted.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

J. W. Pickering, for the defendant, submitted the case on a brief.

W. H. White, for the plaintiffs.

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MORTON, J. There was evidence that the notice was served by leaving an attested copy with some one on the demised premises, which were occupied by the defendant. In such a case it is well settled that, if the person to whom the notice was given was the wife or servant of the defendant, the service was sufficient on the ground that that fact would furnish presumptive evidence that the defendant received the notice. *Walker* v. *Sharpe*, 103 Mass. 154. *Grundy* v. *Martin*, 143 Mass. 279. *Jones* v. *Marsh*, 4 T. R. 464. We think that there was evidence on which the jury were justified in finding that the woman to whom the notice was given was the wife or servant of the defendant. It also appears from the officer's return on the notice that it was served by leaving an attested copy at the defendant's last and usual place of abode, that is, at his dwelling-house. In such a case it is likewise settled that giving the notice to the defendant's wife or servant constitutes a sufficient service. 2 Greenl. Ev. § 324. *Exceptions overruled.*

JAMES BURNS *vs.* WALLACE STUART.

Middlesex. January 15, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Dog — Damage from Bite — Evidence — License.

A license for a dog, issued prior to an act of biting for which the licensee is sued, is not admissible in the action to corroborate his evidence that the only dog which he ever owned was of a certain breed, weight, and color, differing in these particulars from the dog described in the plaintiff's testimony as the one which bit him.

TORT, under Pub. Sts. c. 102, § 93, to recover double the amount of the damage sustained from the bite of a dog. At the trial in the Superior Court, before *Fessenden*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the exclusion of evidence, the nature of which appears in the opinion.

J. A. McGeough, for the defendant.

T. W. Coakley, for the plaintiff.

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HOLMES, J. This was an action of tort for the bite of a dog. The dog which bit the plaintiff was described in the testimony as a bull terrier or bull dog, weighing about fourteen pounds, and of a light color with a spot. The defendant denied that he owned the dog described, and testified that the only dog which he ever owned was a fox terrier weighing about ten pounds, white, without a spot; that he owned this dog while living in Somerville, as he had done until about two weeks before, and that he had had it licensed there. He identified and offered the license. It was excluded, and the defendant excepted.

Presumably the description of the dog in the license was given to the city clerk by the defendant. There might be circumstances where the fact that he had made such a declaration before the existence of the present interest would be material. See *Murchie* v. *Cornell*, 155 Mass. 60, 63, 64. But, so far as appears in the exceptions, his testimony under oath would have gained no legal corroboration from his having said the same thing when not sworn and not subject to cross-examination. See *Sewall* v. *Sewall*, 122 Mass. 156, 163.

Exceptions overruled.

MARY GRAY *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. January 18, 1897.— February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Personal Injuries — Railroad — Negligence in Management of Entrance to Station — Passenger — Master and Servant — Inference from Evidence.

An action may be maintained against a railroad corporation for injuries sustained by a person, who, while entering its station for the purpose of taking a train, is struck and knocked down through the act of the defendant's servant in ejecting a drunken man from the station.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff while entering its station, if he testifies that he had travelled over the defendant's road for fifteen years, that he had passed through this entrance a great many times, and that, after the accident, he was helped to the waiting room and took the train for home, it may be inferred, in the absence of anything to the contrary, that he was within the defendant's implied invitation to enter there.

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In an action against a railroad corporation for injuries sustained by a person while entering its station, through the act of its servant in ejecting a drunken man from the station, if there is evidence tending to show that the servant was employed specially for the purpose of keeping the men's waiting room and closet clean and in proper condition, and that it was a part of his duty to keep the room and closet free from loafers, the jury may find that, in ejecting the drunken man, he was engaged in doing what he was employed to do, and, if this was so, the defendant may be held responsible, even although the servant may have exceeded his detailed instructions; and, in the absence of anything to show the contrary, or of any question raised upon the point at the trial, it may be inferred that the drunken man was found in the men's waiting room or closet rather than in one of the other rooms opening from the corridor where the accident occurred.

TORT, for personal injuries occasioned to the plaintiff on April 24, 1894, while entering the defendant's station in Boston for the purpose of becoming a passenger on one of its trains, by the alleged negligence of the defendant in the management of the entrance to the station. Trial in the Superior Court, before *Dunbar*, J., who allowed a bill of exceptions, in substance as follows.

It appeared in evidence that, in going to the station of the defendant, the plaintiff entered through a porch which was connected with one of the entrances of the station and was about twelve and a half feet wide and about fourteen feet in length; that then she stepped up one step into a passageway, which was about forty feet long and twelve feet wide, having on its right hand side the men's waiting room, with an entrance thereto about twenty-six feet from the step between the porch and the entry, and in the rear of the waiting room a toilet room connecting therewith; that on the left of the entry there was a general waiting room for passengers, with doors leading thereto about opposite to the door to the men's waiting room; that at the extreme end of the entry was a barber's shop with a door opening into the entry; and that there were swinging doors in the entry about seventeen feet from the entrance to the men's waiting room.

The plaintiff testified that, while she was passing along the entry and between the outer entrance and the swinging doors across the entry, and after she had gone a few feet, she saw a colored man and a white man coming through the swinging doors; that the colored man had the white man by the shoul-

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ders, and was pushing him through the swinging doors; that she turned into the left close to the building, and thought they would have plenty of room to pass her, but they hit her on the side and she fell, receiving the injuries complained of; that they were coming pretty fast; that the colored man helped her up, and said that the white man was drunk; that she was helped to the waiting room for ladies, and took the train for home; that she had seen this colored man in the station several times before, and that she should think he was dressed in working clothes, "sometimes with blue clothes on"; that she had seen him one day sweeping out the entrance, and did not remember that she had ever seen him do anything else; and that she had travelled over the defendant's road for fifteen years, and had passed through this passageway a great many times.

Walter Paige, called as a witness by the plaintiff, testified that, during the year prior to the accident, he came to Boston from Stoneham about once a week, arriving at the defendant's station; that he had seen in April, 1894, before the accident, a colored man in the men's room, whom he identified in the court room as the person referred to in the plaintiff's testimony; that he had seen him cleaning the men's waiting room, polishing boots, and speaking occasionally to people in the seats, who, after he had talked with them, would sit up straighter or go out of the room, and his best recollection was that he had seen him put his hands on them and give them a shake and wake them up; that he spoke to them when in the act of waking them up, but he did not know what he said; and that he did not remember ever seeing him try to pull these men out of their seats, or lead anybody out.

Frank E. Trask, a witness called by the plaintiff, testified that he was a police officer of the city of Boston, and in April, 1894, and for about twelve years before that, his beat was in the vicinity of the defendant's station; and that while he was about that station he was acquainted with the colored man in question. He was asked what he had seen this colored man do during the two years prior to April, 1894, and he answered, "He was cleaning the gents' waiting room and the gents' toilet room attached to the same. I have seen him go into the closet and wake men up and have conversation with them, and in con-

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sequence of that conversation the men went out. I never saw any acts on his part other than shaking them up and waking them up." He further testified that the colored man would hold the closet door open for them to go out, and sometimes acted as agent for the witness in that matter; that he never saw him eject anybody; and that he could not say that he ever had seen him go to the door with these people.

Leonard S. Bean, called as a witness by the defendant, testified that he had been station agent at this station for about ten or twelve years; that he hired this colored man, whose name was Warren, a year or two before April 24, 1894, and employed him to clean the men's toilet; that he was carried on the pay roll as "Cleaning of the gents' toilet"; that nobody had any authority to give him instructions aside from himself, unless it might be one of the witness's superior officers, but he never knew of instructions being given him other than what he gave himself; and that all the duties he was told to perform were to keep the men's waiting room and toilet clean and in proper condition. He was then asked whether there was anything else that he employed Warren to do, or instructed him to do; and he answered, "I told him, when men got in the closets there asleep and loafing, to wake them up, and also in the gents' waiting room." He testified further, that, if they did not go out, Warren's instructions were to call the officer in front, one of the city officers, or one of the special officers or police of the railroad who were stationed at the gate; that he never saw Warren removing anybody from the station; that he never saw him lay hands upon anybody except to wake them up; and that, prior to April, 1894, he never knew or heard that Warren ever laid hands on people to eject them from the station.

On cross-examination, the witness testified that it was a part of Warren's duty to keep the men's waiting room and closet clear from loafers.

It was not disputed that, at the time of the accident, the station referred to was under the defendant's control; and that the plaintiff was in the exercise of due care.

At the close of the evidence, the defendant asked the judge to rule that the action could not be maintained, and to direct the

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jury to return a verdict for the defendant, which the judge refused to do; and the defendant excepted.

The judge submitted the following questions to the jury:

"1. Did the defendant use reasonable care in the management of the passageway?

"2. Was the defendant's servant, Warren, acting within the scope of his employment in ejecting the other man?"

The jury answered the first question in the negative, and the second question in the affirmative, and returned a verdict for the plaintiff; and the defendant alleged exceptions.

G. F. Richardson, (*G. R. Richardson* with him,) for the defendant.

M. T. Allen, (*J. H. Murphy* with him,) for the plaintiff.

ALLEN, J. The defendant contends that there was no evidence that it failed to use reasonable care in the management of the passage. This passage or corridor was a general entrance for passengers and others who were within the implied invitation of the defendant to enter the station; and it was the defendant's duty to use reasonable care to keep it safe for them. The trouble came, not from the unexpected act of a stranger, but from the act of one of the defendant's servants, in ejecting a drunken man. The defendant suggests that the danger of injury of this kind was so remote and improbable that it could not reasonably have been anticipated. This argument would have more force if the act causing the injury had come from a stranger. But it might be found to be negligent management not to keep the corridor free from violent acts of the defendant's own servants, which were dangerous to persons entering there for legitimate purposes. The defendant also argues that there was no evidence that the plaintiff was a passenger. She testified that she had travelled over this road for fifteen years, had passed through this passage a great many times, and that after the accident she was helped to the waiting room for ladies, and took the train for home. In the absence of anything to the contrary, it might be inferred that she was within the defendant's implied invitation to enter there.

The defendant further contends that there was no evidence that their servant was acting within the scope of his employment in ejecting the drunken man. There was evidence tend-

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ing to show that he was employed specially for the purpose of keeping the men's waiting room and closet clean and in proper condition, and that it was a part of his duty to keep the room and closet clear from loafers. The jury might well find from the evidence, that in ejecting the drunken man the servant was not "on a frolic of his own," (*Joel* v. *Morison*, 6 Car. & P. 501,) but was engaged in doing what he was employed to do. If this was so, and if his act of ejecting the drunken man was done for the purpose or as a means of keeping the men's waiting room clear from persons in that condition, then the defendant might properly be held responsible, even although he might have exceeded his detailed instructions. *Southwick* v. *Estes*, 7 Cush. 385. *Howe* v. *Newmarch*, 12 Allen, 49. *Bowler* v. *O'Connell*, 162 Mass. 319, and cases there cited.

The defendant now suggests that it did not appear at the trial that the drunken man came from the men's waiting room or closet. A door opened from the corridor into that waiting room, two other doors into the general waiting room, and one at the end of the corridor into the barber's shop. So far as appears, no doubt was expressed at the trial that the drunken man had been in the men's waiting room or closet, and the defendant's servant was not called as a witness. The servant was apparently acting in the performance of what he thought to be his duty, and in the absence of anything to show the contrary, or of any question raised upon the point at the trial, it might be inferred that the drunken man was found in the men's waiting room or closet rather than in the barber's shop or general waiting room.

There was no error in submitting the case to the jury.

Exceptions overruled.

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CHARLES B. STONE, assignee, *vs.* CHARLES J. ADDY.

Middlesex. January 18, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Former Judgment — Estoppel — Exceptions.

If a former verdict and judgment in an action for conversion may have gone on the ground that the defendant had committed no act of conversion at the time when the action was brought, they do not preclude the plaintiff from maintaining a subsequent action for the conversion of the same property.

Exceptions being obviously untenable, the court passed by the question whether the excepting party lost his right of exception by omitting to give due notice of the filing of the exceptions.

TORT, by the assignee in insolvency of George W. Kendrick, for the conversion of certain hay which had been cut in the summer of 1891 by Kendrick from the farm of the defendant and a neighboring farm of one Fairbanks in the town of Harvard, and placed in the defendant's barn on his farm, Kendrick being at the time a tenant at will of the defendant.

At the trial in the Superior Court, without a jury, before *Hammond*, J., it appeared that after Kendrick had removed from the defendant's farm in October, 1891, he went into insolvency, and in the same month the plaintiff was duly appointed his assignee, who, after having made a demand in writing upon the defendant for the property, brought an action against him for the value thereof; that the declaration, which was duly entered in the Superior Court, contained three counts, the first, under Pub. Sts. c. 157, § 96, for a fraudulent preference, the second, under c. 157, § 98, for a fraudulent sale, and the third, for conversion in the common form; that all of the counts referred to the same schedule annexed; that the answer was a general denial; that the case was tried before a jury, and a verdict was rendered for the defendant; and that the execution which issued on the judgment was satisfied by the plaintiff in March, 1893.

It also appeared that on December 14, 1891, the counsel for the plaintiff wrote to the counsel for the defendant that the defendant had converted the hay, and that the plaintiff sought

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to recover its value; that four days thereafter the defendant wrote to the plaintiff that he proposed to have the hay appraised at a certain time named, and on the following day the plaintiff wrote to the defendant stating that he saw no reason for his being present, and the hay was appraised on December 21.

It was agreed that the hay claimed to have been converted in the present suit was the same hay claimed to have been converted in the former suit, and the evidence offered at the former trial to show conversion was given at this trial, and there was also additional evidence at the last trial, including a letter dated April 24, 1893, from the plaintiff to the defendant, demanding that the property be turned over to him, and the refusal of the defendant to deliver it up.

At the present trial the judge, upon evidence as to the issues actually in dispute at the former trial, found that one of the issues at that former trial was whether or not the defendant (even if the property belonged to the plaintiff) had done any act with reference to the property which would constitute conversion, and found upon the evidence at this trial that since the former trial the defendant had converted the hay to his own use.

The judge ruled that the former judgment for the defendant was no bar to the present action, and found for the plaintiff; and the defendant alleged exceptions.

The plaintiff contended that the defendant had lost his right of exception by omitting to give due notice of the filing of the exceptions.

A. V. Lynde & W. P. Harding, for the defendant, submitted the case on a brief.

A. A. Wyman, (*C. B. Stone* with him,) for the plaintiff.

ALLEN, J. The former verdict and judgment might have gone on the ground that the defendant had committed no act of conversion at the time when the action was brought, and therefore they did not preclude the plaintiff from maintaining his present action. *Lea* v. *Lea*, 99 Mass. 493. *Stapleton* v. *Dee*, 132 Mass. 279. *Foye* v. *Patch*, 132 Mass. 105. *Bugbee* v. *Davis*, 167 Mass. 33.

The exceptions being obviously untenable under the previous decisions, we pass by the question whether the defendant lost his right of exception by omitting to give due notice of the filing of the exceptions. *Exceptions overruled.*

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GEDEONI OLIVIERI *vs.* CHARLES F. ATKINSON & another.

Suffolk. January 18, 19, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Breach of Contract — Finding — Domicil — Discharge in Insolvency.

If a case comes to this court on exceptions, with a report of the evidence, consisting of the testimony of witnesses at two former hearings, the first of which was before the same judge who sat in the final hearing, at which no witness testified orally, but the testimony taken at the former hearings was read to him, the evidence before him cannot be treated as merely documentary, and the questions before this court are whether his findings of fact were warranted by the evidence, and whether his conclusion of law therefrom was right.

Evidence that a foreigner, who was a teacher of music, came to this Commonwealth under a contract made in another State, and rendered services thereunder for several months, until the contract was broken by the other party, for which breach an action was brought immediately; that, with the exception of two intervals of three and four months respectively, when he was out of the Commonwealth, he remained here until the trial, twenty months after the action was begun, returning after his first absence by the advice of counsel on account of the litigation, and giving music lessons during his whole stay here; and that, according to his testimony, when he first came here he intended, after finishing his contract, to remain here if he could establish a good business, and if he could not to return abroad, will warrant a finding that he had not made up his mind to make this Commonwealth his permanent place of abode, or to change his domicil; and his claim is not barred by a discharge in insolvency obtained after the action was brought.

CONTRACT, against Charles F. Atkinson and Fred P. Bacon, for breach of a written agreement to employ the plaintiff as a teacher of music. Trial in the Superior Court, without a jury, before *Braley*, J., who ordered judgment for the plaintiff; and the defendant Atkinson alleged exceptions. The facts appear in the opinion.

R. M. Morse, (*J. Duff* with him,) for the defendant Atkinson.

C. F. Choate, Jr., for the plaintiff.

ALLEN, J. The defendant Atkinson obtained a discharge in insolvency, and relied upon it in defence to the plaintiff's claim. The discharge was dated June 28, 1895, and the first publication of notice was on November 21, 1894. The plaintiff's action was brought on June 24, 1893, for breach of a contract dated January 30, 1893. The trial was before a judge sitting without a jury,

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in March, 1894, and he on April 2, 1894, made a finding in favor of the plaintiff. Exceptions were taken by the defendants, which were not allowed till October 22, 1894, and which were never prosecuted further. In November, 1894, the defendant Atkinson filed his petition in insolvency. In February, 1895, the plaintiff moved to dismiss the exceptions, and to enter judgment. A hearing was had on this motion, and it was overruled; but not on the question raised by these exceptions. In February, 1896, the plaintiff filed a motion for judgment, and a hearing was had, at which no witness testified orally, but the testimony of the plaintiff, as given at the two former hearings in the case, and of the defendant Atkinson, was read to the court; and a complete statement of all the evidence which was presented to the court is given in the bill of exceptions. At the close of the evidence, the defendant Atkinson asked the court to rule that, upon all the evidence, the plaintiff on November 21, 1894, was domiciled in this State. The court declined so to rule, made various findings of facts, and ordered judgment to be entered for the plaintiff.

By Pub. Sts. c. 157, § 81, the defendant Atkinson was discharged from debts "due to any person resident therein [that is, in this State] at the time of the first publication of the notice of the issuing of the warrant." The request for a ruling treats the word "domiciled" as equivalent to the statutory word "resident." Such is the usual but not universal meaning of the word as used in our statutes; *Stoughton* v. *Cambridge*, 165 Mass. 251; and in *McDaniel* v. *King*, 5 Cush. 469, such was held to be its meaning as used in the original statute of insolvency in this State, St. 1838, c. 163, § 19.

The question what constitutes domicil is mainly a question of fact, and the element of intention enters into it. Personal absence for a while does not necessarily change one's domicil, and personal presence in a place for a somewhat prolonged period does not necessarily establish domicil there. *Viles* v. *Waltham*, 157 Mass. 542. *Borland* v. *Boston*, 132 Mass. 89. *Chicopee* v. *Whately*, 6 Allen, 508. *Harvard College* v. *Gore*, 5 Pick. 370, 374. The question of domicil is often, as in the present case, rather a complex question, depending on a consideration of many different facts.

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At the outset, we have to inquire what weight shall be given to the findings of the judge before whom the hearing was had. The case comes to us on exceptions, with a report of the evidence. This evidence, as presented, consisted of a report of the testimony of witnesses at two former hearings, but it appears that the first of these former hearings was before the same judge who sat in the final hearing, and it does not appear whether the other of the former hearings was before the same or a different judge. We therefore have the fact, that the judge who allows the exceptions had heard a part of the testimony at the trial of the merits of the original claim of the plaintiff, and had seen and heard both the plaintiff and the defendant Atkinson face to face. Under this state of things, the evidence before the presiding judge can hardly be treated as merely documentary, since a part at least of the testimony read to him had also been heard by him when it was taken. The question before us, therefore, is whether his findings of facts were warranted by the evidence, and whether his conclusion of law therefrom was right. *Schendel* v. *Stevenson*, 153 Mass. 351. *Chase* v. *Hubbard*, 153 Mass. 91. But in a case where the evidence is merely documentary, and a ruling of law is made based thereon, and this court has before it all that was before the trial court, it is proper to re-examine the evidence, and determine if on the whole the judgment was right. *Livingston* v. *Hammond*, 162 Mass. 375.

An examination of the evidence leads to the conclusion that the findings were well warranted. There were certain general facts not in dispute. The plaintiff was a native of Ancona, Italy, and devoted himself to music. He went from Ancona to Naples for purposes of study, thence to Greece as conductor of an orchestra, thence to Milan, thence to Havana, and finally, in 1881, to Paris, where he stayed till 1892. In the autumn of 1892 he came to New York, and remained there till he entered into the contract with the defendants. He was in Boston performing his duties under the contract from February 10, 1893, till June 20, when the defendants broke the contract, having become unable to carry it out further. He brought the present action on June 24, 1893, and soon afterwards left Boston for the summer, returning on September 5 or 6, and staying till June 4, 1894, when he left for Paris. He was in Boston again about

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October 1, 1894, and thence till the hearing in February, 1895, since which time it does not appear where he has been.

In the contract of January 30, 1893, the plaintiff is described as of New York. In the writ, dated June 24, 1893, he is described as of Ancona, Italy. In February, 1894, the defendants moved for an indorser of the writ, on the ground that the plaintiff was not a resident of the State, and an indorser was ordered. There was testimony which seems satisfactory to show that, when he returned to Boston in September, 1893, he came by advice of his counsel, on account of the litigation with the defendants, and to watch the suit. During this and his subsequent stay in Boston, he gave singing lessons. At the trial in March, 1894, the defendants for some reason sought by cross-examination of the plaintiff and otherwise to show that his residence or domicil was not in Boston; and the defendant Atkinson testified that on many different occasions, beginning in February, 1893, and continuing until June, 1893, the plaintiff said that he did not like Boston; that he was ill, and sick of the whole business; and that he wanted to go back to New York, where he could make more money. At the hearing in February, 1895, the plaintiff being asked what on February 10, 1893, (the date of his coming to Boston under his contract,) he meant to do after finishing his contract with the defendants, said: "If I could make very fine business here in America I would remain here; but if business was not right, I went back to Paris, and the most American people would come to me to take lessons. It was to establish my reputation here in America, to be known." The judge found the fact to be in accordance with this testimony of the plaintiff, and that on November 21, 1894, he was living in Boston, engaged in his vocation as a music teacher; that it was his intention, if he could find sufficient business in America, to remain here, but if not, to go back to Paris; and that he had not made up his mind to make Boston his permanent place of abode, or to change his domicil. There was no evidence that the plaintiff had any other strong reason for remaining permanently in Boston, or that after June, 1893, when the defendants broke the contract, he was very successful in earning money by giving singing lessons here.

There is no doubt that an alien may have his domicil or resi-

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dence here, so that a claim held by him against an insolvent debtor would be barred by the latter's discharge. *Harvard College* v. *Gore*, 5 Pick. 370, 377. *Letchford* v. *Convillon*, 20 Fed. Rep. 608. *Von Glahn* v. *Varrenne*, 1 Dillon, 515. Nor are we insensible to the argument that it is a hardship upon the defendant to hold him still liable upon his indebtedness to the plaintiff, when he is discharged from his debts to residents of this Commonwealth. If, however, the plaintiff did not have his residence or domicil here, his claim is by law exempt from the operation of our insolvent laws, and is not barred by the discharge. *Phœnix National Bank* v. *Batcheller*, 151 Mass. 589. *Regina Flour Mill Co.* v. *Holmes*, 156 Mass. 11. The finding to this effect was warranted by the evidence, and must stand.

Exceptions overruled.

GEORGE E. KIMBALL *vs.* NEW ENGLAND ROLLER GRATE COMPANY.

Suffolk. January 20, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Contract — Vote of Directors of Corporation ineffectual to rescind previous Vote.

If, in an action against a corporation, brought by the president thereof to recover his salary and certain commissions, a finding is justified that his contract with the corporation, which was made by vote of the directors, was continued in force according to its terms at a later meeting, when the directors re-elected him president, a vote by them at a meeting held shortly thereafter purporting to rescind the original vote, which fixed the amount of the salary and commissions, will be regarded as nugatory.

CONTRACT, for the balance of the salary due the plaintiff as president of the defendant corporation for a part of the month of May and for all of the month of June, 1895, and for his commissions on certain sales made from January 1 to July 1, 1895. Writ dated July 26, 1895. At the trial in the Superior Court, without a jury, before *Sheldon*, J., it appeared that the plaintiff was paid his salary for the first four months of 1895 on the basis of two thousand dollars for the year, and that one hundred

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dollars was also paid to him on account of his salary for the month of May. The judge found for the plaintiff in the sum of $453.27; and the defendant alleged exceptions, the nature of which appears in the opinion.

W. Howland, for the defendant.

E. B. Hale & F. E. Dickerman, for the plaintiff.

ALLEN, J. On March 2, 1895, the directors passed a vote fixing "the salary of the president, George E. Kimball, for one year, commencing January 1, 1895, at two thousand dollars"; also to pay him a certain commission on sales. This was in pursuance of an agreement between the plaintiff and the board of directors, which perhaps by implication would be subject to his re-election. At a meeting of a board of the directors on May 7, 1895, he was re-elected president, and no formal action was taken relative to his salary, it being stated by him in the presence of the other directors that no action was necessary, inasmuch as there was already an existing contract for the entire year of 1895. Two weeks later, the directors passed votes rescinding the votes of March 2. From these facts, it was competent for the court to find that when the plaintiff was re-elected on May 7, 1895, the existing contract for his compensation was confirmed. If it be assumed that the new board of directors might at that time have declined to recognize or continue it, they did not do so, although it was specially brought to their attention. No formal vote of confirmation was necessary. The court might well find that the existing contract was continued in force according to its terms; *Commonwealth Ins. Co.* v. *Crane*, 6 Met. 64; and if so, the later votes purporting to rescind the former ones would be nugatory.

Exceptions overruled.

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SUMNER M. HANDY *vs.* ALLEN P. ALDRICH.

Suffolk. January 21, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Construction of Written Agreement — Realty and Personalty — Breach of Warranty — Damages.

The owners of a wharf entered into a written agreement with A., who held a lease from them of the wharf, that he should erect a building thereon, that they should contribute a certain sum towards its cost, the balance of the cost being borne by him, and that at the expiration of the lease, unless it should be renewed, or on its termination for any cause, the building should be appraised by appraisers selected as therein provided, and they should pay to him the same proportion of the appraised value that the amount paid by him towards the cost bore to the whole cost thereof. The lease was not renewed at its expiration, but A. remained in possession of the premises as a tenant at will for over four years, when he sold and transferred to B. "the lease now held by me," and also the building erected by him on the wharf, subject to the terms and conditions contained in the lease and in the above named agreement, with certain qualified covenants of ownership of the property. Three years later, B. and C. executed an agreement, by which B. sold and transferred to C. the building in question, and C. agreed that, in case the owners took the wharf for other purposes and compelled him to give up possession, he would pay to B. all sums received by him from them as indemnity for the building under their agreement with A. over and above the sum which he agreed to pay for the building; and this agreement contained covenants of ownership, of freedom from encumbrance, of right to sell, and of full warranty. There was no appraisement of the building at the expiration of the lease, or afterwards; but the owners of the wharf continued to receive rent from A., B., and C. successively, until the latter finally failed in business and surrendered the premises to them, of which they then took possession for the first time. *Held*, in an action by C. against B. for breach of warranty, that there was a total failure of title to the building, which remained in the owners of the wharf; that B.'s liability under his warranty was not limited by the clause relating to indemnity; and that nothing appeared to reduce damages.

CONTRACT, for breach of warranty in the sale of a building in Boston. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

W. F. Kimball, for the defendant.

J. W. Spaulding & R. W. Hunter, for the plaintiff.

ALLEN, J. The building in question was real estate from the time of its erection. It was built by one Murch, under the fol-

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lowing circumstances. On June 29, 1881, the Proprietors of Liverpool Wharf entered into a written agreement with Murch, who held a lease from them of Pearl Street Wharf, which was to expire May 1, 1884, that he should erect a building thereon, that they should contribute $1,000 towards its cost, the balance of the cost being borne by him, and that at the expiration of the lease, unless it should be renewed, or on its termination from any cause, the building should be appraised by appraisers selected as therein provided, and they should pay to him the same proportion of the appraised value that the amount paid by him towards the cost bore to the whole cost thereof. This showed clearly that the title to the building was to be and remain in the Proprietors of Liverpool Wharf, and that Murch was not to have any right of removing it, but that he should have a certain right of reimbursement in respect to the cost of it.

The lease expired May 1, 1884, and it would seem that it was not renewed, but Murch remained in possession of the premises as tenant at will; and on October 3, 1888, he sold and transferred to Aldrich, the defendant, "the lease now held by me," etc.; "also the large wooden building constructed by me on the Pearl Street Wharf," subject to the terms and conditions contained in the lease, and in the agreement dated June 29, 1881; with certain qualified covenants of ownership of the said goods and chattels.

On January 27, 1892, Aldrich and Handy (the plaintiff) executed an agreement together, by the terms of which Aldrich sold and transferred to Handy "the following goods and chattels, namely, the wooden building now situated on Liverpool Wharf, Boston, and owned by me, comprising the long wooden building on the north side of said Liverpool Wharf, and the small wooden building on west side at head of said wharf, and I, the said Allen P. Aldrich, do agree to protect the said S. M. Handy, his heirs and assigns, in their possession of the said building. And the said S. M. Handy does also agree that in case the owners of the said Liverpool Wharf take the said wharf for other purposes and compel the said S. M. Handy to give up possession thereof, for the said taking of which the said owners of Liverpool Wharf have agreed to pay an indemnity for the buildings thereon, as set forth in a lease given to George O. Murch, the said S. M.

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Handy does agree that all sums of money so received, over and above the two thousand dollars which he agrees to pay for said buildings, shall be paid over to said Allen P. Aldrich." Habendum to Handy, his executors, administrators, and assigns, with covenants of ownership of the said goods and chattels, and of freedom of encumbrances, and of right to sell, and with full warranty.

The lease to Murch contained no reference to indemnity. By the misrecital to that effect in the above agreement, it is probable that the agreement of June 29, 1881, was intended.

There was no appraisement of the building at the expiration of the lease, or at any later time. The Proprietors of Liverpool Wharf continued to receive rent from Murch till Aldrich took possession; they then received the rent from Aldrich till January 27, 1892, and after that time they received the rent from Handy, until he abandoned the premises; accepting Murch, Aldrich, and Handy, respectively, as their tenants. The treasurer of the proprietors testified that the buildings were not actually taken possession of by the company until about two or three years after the date of the bill of sale, Aldrich to Handy, when the buildings were abandoned by Handy because of his failure in business, and the company did not take possession of the buildings till they were surrendered to the company by him; that they took possession because he told them that he no longer cared to occupy the premises, and he gave them up; that previous to that time they made no claim whatever upon the buildings; and that after they took possession the plaintiff and the witness had a talk about the advisability of an appraisement, and the witness, as agent of the company, had a carpenter look at the buildings to get his idea of their present value.

It is obvious that neither Murch nor Aldrich nor Handy ever had any title to the building, and that nothing passed by the transfers by Murch to Aldrich, and by Aldrich to Handy. There was a total failure of title to the building, and, so far as that is concerned, the damages would properly be assessed on that basis. *Grose* v. *Hennessey*, 13 Allen, 389. *Watriss* v. *Cambridge National Bank*, 124 Mass. 571. *McIver* v. *Estabrook*, 134 Mass. 550.

The defendant, however, contends that his liability under his

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warranty is limited by the clause relating to indemnity, so that he transferred to the plaintiff only his right, title, and interest in the buildings. The written instrument does not admit of this construction. The agreements and covenants were full and clear, and imported an absolute title in Aldrich, and the warranty was also absolute.

The defendant suggests that there was some evidence that the company waived their rights of ownership of the buildings, and took initiatory steps towards an appraisement. We see no evidence of a waiver of ownership, or, in other words, of a transfer of their title to one or the other of their tenants. There was some evidence tending to show that the Proprietors of Liverpool Wharf waived the provision in their agreement with Murch as to the time of making the appraisement, and that at the time of his transfer to Aldrich he might have insisted on an appraisement and the reimbursement provided for in the agreement, and that he transferred this right to Aldrich, and that Aldrich transferred it to the plaintiff, and it is possible that it might have been made to appear that in equity the proprietors at the time of the transfer to the plaintiff were still bound to submit to such an appraisement, if the same had been demanded, and to make reimbursement accordingly. If the plaintiff had in fact received anything from the proprietors under such circumstances, no doubt the defendant would have been entitled to avail himself thereof by way of recoupment in this action, if this ground of defence had been pleaded. And if the plaintiff had so received from the proprietors more than two thousand dollars, not only would his present claim against the defendant have been wholly extinguished, but he would have been bound to pay over the surplus to the defendant. But there is no suggestion or pretence that he has ever received anything from the proprietors. No recoupment is pleaded, nor does the answer contain any ground of defence except a bare general denial. The defendant has not averred nor proved that the plaintiff failed to do anything which he was bound to do by way of prosecuting a claim for reimbursement against the Proprietors of Liverpool Wharf, or that he agreed to prosecute such claim; nor does it appear that any such claim could have been enforced by the plaintiff if he had prosecuted it. The case was not tried on the assumption that

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any such ground of partial defence existed. There were no pleadings, no rulings, no requests for rulings, and no facts sufficient to present it. It could only be maintained, if at all, by showing that the plaintiff failed to receive money from the proprietors through some breach of duty towards the defendant, that is, through a failure to do something which he was bound to do for the benefit of the defendant. *Sawyer* v. *Wiswell*, 9 Allen, 39. No question of this kind is presented by the exceptions. *Exceptions overruled.*

JOHN BRAITHWAITE *vs.* FRANK HALL.

Middlesex. January 22, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Personal Injuries — Measure of Damages — Declaration — Demurrer — Exceptions.

In an action for injuries to the plaintiff's person and bicycle, a demurrer to a declaration which alleges that, on a certain day while riding his bicycle on M. Street in the city of C., in the exercise of due care, he was run over by the defendant's horses and carriage, negligently driven by a servant of the defendant while acting in the scope of his employment, and was severely injured and his bicycle was demolished, is properly overruled.

In an action for personal injuries alleged to have been occasioned to the plaintiff by the negligence of the defendant's servant, the defendant has no ground of exception to an instruction to the jury that, if the plaintiff was entitled to recover at all, he was entitled to compensation for the wages actually lost by him through his inability to work at his trade on account of the injuries sustained by him.

TORT, for injuries occasioned to the plaintiff's person and bicycle by being run over by a pair of horses attached to a hack and driven by the defendant's servant.

The declaration was as follows: "And the plaintiff says that on the thirtieth day of May, 1895, while riding his bicycle on Mount Auburn Street in the city of Cambridge, in this Commonwealth, and while in the exercise of due care, he was run over by the defendant's horses and carriage, negligently driven by a servant of the defendant while acting in the scope of his employment. Whereby the plaintiff was severely injured, made

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sick, put to great expense and loss of time, and whereby his bicycle was demolished."

The defendant demurred to the declaration, assigning as grounds therefor that it set forth no cause of action in law against the defendant; that it nowhere averred that the alleged injuries were incurred by reason of any fault or negligence or tortious act of the defendant, or for which the defendant was liable; that it nowhere averred that the alleged servant of the defendant was engaged at the time upon the defendant's business; and that, if it stated any cause of action, it joined in one count two separate and distinct grounds of action.

Not waiving the demurrer, the defendant filed an answer setting up a general denial and want of due care on the part of the plaintiff.

In the Superior Court the demurrer was overruled, and the plaintiff appealed. Trial before *Blodgett*, J., who, in instructing the jury on the matter of damages, ruled, among other things, that, if the plaintiff was entitled to recover at all, he was entitled to compensation for the wages actually lost by him through his inability to work at his trade on account of the injuries sustained by him through the negligence of the defendant's servant. To this ruling the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. F. Simmons, for the defendant.

D. D. Corcoran, for the plaintiff, submitted the case on a brief.

HOLMES, J. The demurrer must be overruled. The meaning of the declaration is plain and sufficient. Nowadays we do not require pleadings to be guarded against all the possible distortions of perverse ingenuity. The single collision which caused the damage to the plaintiff's person and to his bicycle was one cause of action. "Un trespasse ne serra mye deux foitz puny." Y. B. 5 Ed. II. 134, 135. *Doran* v. *Cohen*, 147 Mass. 342, 344. *Bliss* v. *New York Central & Hudson River Railroad*, 160 Mass. 447, 455.

The ruling as to damages was correct. It is true that, when a man is allowed to prove his average earnings or the wages actually lost by him, they are proved as a measure of the value of the time and power to labor of which he has been deprived, not

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as themselves recoverable *eo nomine*. But the distinction does not appear to be material in this case. There is nothing to show that the wages were not reasonable, and a proper measure of the value of the plaintiff's time. It is argued for the defendant, that the true measure is the market value of the average wages of a man of the plaintiff's average capacity working in the same employment. But the cases cited do not sustain the position, and there are many decisions adopting the test of the individual's experience. If any distinctions in the value of men's time are admitted there is no reason why the whole actual difference should not be recognized. To this extent a tortfeasor takes the risk of the value of what he destroys. *Murdock* v. *New York & Boston Despatch Express Co.* 167 Mass. 549, and cases cited. See also *Lake Shore & Michigan Southern Railway* v. *Frantz*, 127 Penn. St. 297, 308.

Demurrer overruled; exceptions overruled.

CHARLOTTE E. WILLEY *vs.* BOSTON ELECTRIC LIGHT COMPANY.

Suffolk. January 22, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Loss of Life — Employers' Liability Act — Due Care — Law and Fact — Action — Evidence — Negligence — Conscious Suffering — Pleading.

The insulation of an electric wire was burned off by lightning near a certain pole, and early in the evening A., a night lineman, was sent out. He found the pole where the electricity was escaping, went back again to the station, and had the electricity turned off from the circuit. He then returned, and by pushing the handle of a cut-out box on the pole made it impossible for the electricity to reach that pole. He then went back again to the station, and the electricity was turned on to the circuit, lighting all the lamps except the one upon the pole in question. About an hour and a half later, B., a night patrolman in the employ of the corporation, not knowing that there had been trouble, climbed up the pole, turned on the electricity by means of the cut-out box, as it was his duty to do when the trimmers had left it turned off, and received a shock which caused his death. *Held*, in an action therefor against the corporation, under the employers' liability act, St. 1887, c. 270, that the question whether he was in the exercise of due care was for the jury. *Held, also*, that evidence that, an hour

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or two after the accident to B., another of the defendant's men cut the wires running into the cut-out box and joined them above the box, and in that way cut the electricity off from the pole, was admissible to show what A. might have done; there being evidence that, if cutting the wires was the proper thing for the defendant to do, it was A.'s business to do it.

The words "defect in the condition of the . . . machinery" in the employers' liability act, St. 1887, c. 270, do not refer to its working capacity, but to its condition with regard to the safety of the employees; and if such a defect may be remedied by a temporary device so as to remove the danger to the employees, a failure to adopt such means may be negligence on the part of the employer which will support an action under the statute.

In an action under the employers' liability act, St. 1887, c. 270, for causing the death of an employee who died from a concussion of the brain, although there is evidence of a few scattered words having been uttered by him, the jury will be warranted in finding that he never regained consciousness so far as to suffer.

If the declaration in an action under the employers' liability act, St. 1887, c. 270, for causing a death by a defect in the condition of the defendant's works and machinery, points out correctly the general character of the defect, the precise nature of which is peculiarly within the defendant's knowledge, this is enough, and if it describes the defect further in a particular manner, the words may be stretched to cover the case, or they may be stricken out and leave the declaration good.

TORT, under the employers' liability act, St. 1887, c. 270, for causing the death of the plaintiff's husband, Stephen L. Willey, while in the defendant's employ. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

C. A. Snow, (*E. W. Burdett* with him,) for the defendant.

W. N. Osgood, for the plaintiff.

HOLMES, J. This is an action under St. 1887, c. 270, §§ 1, 2, for causing the death of the plaintiff's husband by a defect in the condition of the defendant's works and machinery. The story, so far as material, is short. The insulation of the defendant's wire was burned off by lightning, near the pole where the accident happened. At ten minutes past seven it was discovered that there was trouble, and one Murphy, a night lineman, was sent out. He found the pole where the electricity was escaping, went back to the station, and had the electricity shut off from the circuit. He then returned, and, by pushing the handle of a cut-off box on the pole, made it impossible for the electricity to reach that pole. He then went back to the station and the electricity was turned on to the circuit, lighting

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all the lamps except the one upon the pole in question. At about a quarter before nine, the plaintiff's husband, a night patrolman, not knowing that there had been trouble, climbed up the pole, turned on the electricity by means of the cut-out box, as it was his duty to do when the trimmers had left it turned off, and received a shock which caused him to fall to the ground, and in that way killed him. The main question is whether there was a case for the jury.

It may be assumed that it would have been impossible to discover and to remedy the damage to the insulation that night. All that was known was that for some reason the electricity was escaping at that pole. But it was proved, subject to the defendant's exception, that an hour or two later another of the defendant's men cut the wires running into the cut-out box and joined them above the box, and in that way cut the electricity off from this pole, and it was argued that, in view of the probability of unwarned patrolmen doing just what the deceased did, this course should have been adopted by Murphy. We are of opinion that the evidence was admissible to show what was possible for Murphy, and that the argument was proper for the consideration of the jury.

For the defendant, it was urged that the defect was the burnt insulation, and that this could not have been remedied before the accident. But this is narrowing the words of the statute to an impracticable precision. The words are "defect in the condition of the . . . machinery," not "defect in the machinery." As the presiding judge very properly ruled, they do not refer to its working capacity, but to its condition with regard to the safety of the employees. So, when the statute goes on to speak of the defect not having been remedied, it does not mean that the machine must have been made perfect for working purposes, but that its dangerous condition must have been ended. This may be done by a temporary device, as well as by permanent repairs. It was not necessary that the break in the insulation should have been discovered and mended, if, as was shown to be the fact, the danger could have been removed by easy and obvious means, either those adopted or by a warning signal.

There was evidence that, if cutting the wires was the proper thing for the defendant to do, it was Murphy's business to do

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it. He was employed to find trouble where there was any, and to remedy it if he could. That is to say, he was, or might have been found to be, "intrusted with the duty of seeing that the works and machinery were in proper condition," so far as this accident was concerned.

As to the care shown by the deceased, the jury may have found that he received the shock too soon after the danger became manifest to avoid it by throwing the current off again. It was for the jury to say too, whether, under the circumstances as they appeared to him, he ought to have protected himself more than they were warranted in finding that he did.

The deceased died from a concussion of the brain. There was testimony of a few scattered words having been uttered by him, but the jury were warranted in finding that he never regained consciousness so far as to suffer.

If there was any question of variance between the pleading and the proof, the case being one where the precise nature of the defect would be peculiarly within the defendant's knowledge, it would have been monstrous to allow the trial to go for nothing on that account. There was no surprise, unless to the plaintiff, and an amendment would have been allowed, or would be allowed now, as of course, if necessary. The declaration pointed out the general character of the defect correctly, as a defect in the condition of the electric lighting apparatus upon the pole which has been mentioned. That was enough. The declaration described it further as a defective crane, and its negligent connection with said light and said pole. The words can be stretched to cover the case, or they could be stricken out, and leave the declaration good.

Exceptions overruled.

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MUNICIPAL SIGNAL COMPANY *vs.* CITY OF HOLYOKE.

Suffolk. January 25, 26, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

City — Contract — Vote of Council — Authority of Committee.

A city council passed a vote, purporting to authorize a committee to advertise for bids and to award the contract for the equipping of the city with a system of electric signals. The committee advertised for bids, and passed a vote to award the contract to A., who was the lowest bidder, "providing that the city government provide the committee with" a sum named "to purchase the system," and made a report to that effect, which was accepted by both branches of the city council. *Held*, in an action by A. against the city for breach of the alleged contract, that the power of the committee was exhausted by its action; and that, the city government never having provided the sum to purchase the system, no contract was made by the vote.

CONTRACT, for breach of an alleged contract for the equipping of the defendant city with a system of electric signals. Trial in the Superior Court, before *Hopkins*, J., who ruled that the plaintiff was not entitled to recover; ordered the jury to return a verdict for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. If the plaintiff was entitled to go to the jury, a new trial was to be ordered; otherwise, judgment was to be entered for the defendant. The facts sufficiently appear in the opinion.

W. A. Hayes & H. H. Baker, for the plaintiff.

J. Fox, for the defendant.

HOLMES, J. This is an action for breach of an alleged contract for the equipping of the defendant city with a system of electric signals. See *Steele* v. *Municipal Signal Co.* 160 Mass. 36. It is not necessary to consider all the objections which would have to be answered before the plaintiff could prevail. A vote was passed by the city council, purporting to authorize the committee on police to advertise for bids, and to award the contract. The vote does not appear to have been a two thirds vote, and if it purported to authorize the creation of a debt, the debt was not for current expenses, payable out of current revenues, as in *Smith* v. *Dedham*, 144 Mass. 177, 180. See Pub. Sts.

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c. 29, § 7; *Agawam National Bank* v. *South Hadley*, 128 Mass. 503. The committee advertised for bids, and passed a vote not communicated to the plaintiff to award the contract to the plaintiff, which was the lowest bidder, "providing that the city government provide the committee with ten thousand dollars to purchase the system," and made a report to that effect, which was accepted by both branches of the city council. By the joint rules and orders of the city council all questions involving parliamentary law, not expressly provided for, shall be decided by Cushing's Manual of Parliamentary Practice. By § 290 of that book, "The report of a committee being made and received, the committee is dissolved, and can act no more without a new power." Under the foregoing rules, or without them, the power of the committee was exhausted by the action recited above. No contract was made by the vote, if for no other reason, because the city government never did provide the sum to purchase the system. It is unnecessary to examine the subsequent transactions, by which two of the committee undertook to bind the city in the absence of the third member after their powers were at an end. *Judgment for the defendant.*

MARY J. ROBBINS *vs.* HYMAN I. ATKINS.

Suffolk. January 26, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Personal Injuries — Landlord and Tenant — Negligence — Evidence — Law and Fact.

An action may be maintained against the owner of a tenement house, having a cellar staircase used in common by all the tenants, for injuries sustained in consequence of the stairs giving way as a tenant was passing over them, the probable cause of which was that a contractor employed by the landlord to deepen the cellar had removed the earth which supported the staircase; and the plaintiff's assent to the question, on cross-examination, "Did not exercise the slightest care?" does not warrant the conclusion, as matter of law, that he was negligent.

In an action against a landlord for personal injuries sustained by his tenant, while passing over a cellar staircase, in consequence of its collapse, caused by the fact

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that a contractor employed by the landlord to deepen the cellar had removed the earth which supported the staircase, no exception lies to the exclusion of the question to the contractor whether the defendant had any control over the contractor's men, the defendant having been permitted to show the facts as to his control.

TORT, for personal injuries occasioned to the plaintiff, who was one of several occupants of a tenement house in Boston owned by the defendant, by the alleged negligence of the latter in allowing a staircase used in common by all the tenants to become defective and dangerous. At the trial, in the Superior Court, before *Gaskill*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

S. H. Tyng, for the defendant.

W. A. Morse, for the plaintiff.

HOLMES, J. This is an action by one of the occupants of an upper story in a house against the landlord, for injuries received in consequence of the cellar stairs giving away as she was passing over them. The cellar staircase was a common passageway, for which the defendant had the usual responsibility of a landlord. The probable cause of the collapse was that a contractor employed to dig down the cellar had removed the earth which supported the staircase. The presiding judge was asked to take the case from the jury, and also to rule that, if the condition of the stairs was due to the work of an independent contractor, or of a person acting without the defendant's authority, the defendant was not liable, all of which he refused, and the defendant excepted. At the close of the charge, the defendant suggested that, while the contract did not provide specifically for work upon the stairs, yet, if the deepening of the cellar required interference with the stairs, then the contract required it. The court accepted the suggestion, and thereupon instructed the jury, in substance, that if the defendant had reasonable cause to believe that the carrying out of the contract would leave the staircase in an unsafe condition, he would be responsible if he failed to use reasonable care.

This last instruction sufficiently points out why it was impossible to give the rulings asked for by the defendant, so far as his conduct was concerned. His responsibility was not limited to cases where he had made the stairs unsafe by his own act, al-

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though the intervention of a contractor might not prevent the danger being attributed directly to him, *Woodman* v. *Metropolitan Railroad*, 149 Mass. 335, 340, but he was bound to use reasonable care to keep or to restore safety. The testimony was that he came to the house quite often, and so probably knew, in a general way at least, the state of the work. And whether he did or not, the most natural inference from the contract was that it contemplated just what happened. If so, it was the defendant's duty to see that care was taken to shore up the staircase, or to warn the tenants. *Looney* v. *McLean*, 129 Mass. 33. *Lindsey* v. *Leighton*, 150 Mass. 285.

It is argued that the plaintiff was negligent, and special reliance seems to be placed on the plaintiff's assent to a question on cross-examination, "Did not exercise the slightest care?" But the jury, not the plaintiff, was the judge of that. Moreover, all that the plaintiff meant, it is plain, is that she was not paying particular attention to the stairs, and there was no reason why she should have done so. If her foot had slipped from inattention, the case might have been different. But she had gone over the stairs the evening before without trouble, and she was not called upon to look out for a danger to which she ought not to have been subjected.

An exception was taken to the exclusion of a question to the contractor, whether the defendant had any control over the witness's men. The bill of exceptions states that the defendant was permitted to show the facts as to his control, so that the exclusion was confined to the question of law as to the defendant's legal authority. Strictly, the defendant was not entitled to put the question. So far as his authority was an inference from acts, it was for the jury to draw it, and whether it was given by the written contract was a question of construction for the court.

Exceptions overruled.

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HENRIETTA L. DIXON *vs.* NATIONAL LIFE INSURANCE COMPANY.

Suffolk. January 26, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Life Insurance — Assignment of Policy — Insurable Interest — Instructions — Statute — Interpleader — Mortgage or Pledge.

If the assignment of a policy of life insurance by the assured and his wife, to whom it is made payable, is absolute and *bona fide*, it is not necessary in an action thereon by the assignee that he should have an interest in the life insured, either as between himself and the company, which makes no objection, or as between himself and his assignors.

In an action on a policy of life insurance brought by the assignee thereof, a ruling requested by the beneficiary named therein, who intervenes as a claimant, and, who with the assured made the assignment, on the hypothesis that the assignment was for security only, is made immaterial by the finding of the judge that the assignment was absolute and *bona fide*.

The St. 1886, c. 281, in allowing a defendant, when it appears that the amount of his liability, which is not in dispute, is claimed by another party than the plaintiff, to compel the claimant or claimants to interplead, does not exclude an equitable claim any more than interpleader proper; and the assignee of a policy of life insurance standing as a claimant of the residue in equity of the proceeds of the policy, in equity has a right to prove by parol that an assignment made by him to another, although seemingly absolute, in fact was a mortgage or pledge.

CONTRACT, upon a policy of life insurance. Trial in the Superior Court, without a jury, before *Fessenden*, J., who made certain findings, to which each of two claimants who had intervened under St. 1886, c. 281, alleged exceptions. The facts and findings appear in the opinion.

B. D. O'Connell, for Maria L. Carr.

F. E. Dunbar, for Charles M. Erskine.

HOLMES, J. This is an action on a policy of life insurance on the life of one William M. Carr, brought by an assignee of the policy. The defendant admitted its liability, and paid the money into court. Upon its petition the excepting parties, Maria L. Carr, the original beneficiary of the policy, and Charles M. Erskine, an assignee from the plaintiff, were summoned in as claimants. The case was tried by a judge without a jury, and he found that the first assignment was absolute and *bona*

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fide, that the second was by way of security, and that the plaintiff was entitled to receive what was left after payment of the debt secured to Erskine.

Maria L. Carr excepted to the refusal of rulings as to the absence of insurable interest in the plaintiff. The short answer to these exceptions is, that upon the record and findings of the court it was not necessary that the assignee should have an interest in the life insured, either as between herself and the company, which makes no objection, or as between her and her assignors. *Mutual Ins. Co.* v. *Allen*, 138 Mass. 24. A ruling requested on the hypothesis that the assignment to the plaintiff was for security only was made immaterial by the finding of the judge.

The assignment to Erskine was absolute in form, like the earlier one, and he excepted to the admission of evidence of an oral agreement that it was given only as collateral security. It is plain that St. 1886, c. 281, in allowing a defendant in an action at law, "if it appears that such amount is claimed by another party than the plaintiff," to compel the claimants to interplead, does not exclude equitable claims any more than interpleader proper. *Underwood* v. *Boston Five Cents Savings Bank*, 141 Mass. 305, 306. The plaintiff stands as a claimant of the residue in equity, and in equity she has a right to prove by parol that the assignment, although seemingly absolute, in fact was a mortgage or pledge. *Newton* v. *Fay*, 10 Allen, 505. *Campbell* v. *Dearborn*, 109 Mass. 130. *Stevens* v. *Wiley*, 165 Mass. 402, 406.

Exceptions overruled.

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FRANK W. FREEBORN *vs.* MARGARET J. FREEBORN.

Suffolk. January 27, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Divorce — Cruel and Abusive Treatment — Acts and Words of Wife.

If, in a libel for divorce for extreme cruelty and cruel and abusive treatment, it appears that, though the libellant was affected injuriously in his health to some extent by his wife's acts and words, she had no purpose to harm him in this manner, but in part was moved by what seemed to her good motives and by a desire for his success in life, and in part by her own nervous condition, she being in reality strongly attached to him and her feelings being affectionate, the decision of the justice dismissing the libel will be accepted as final.

LIBEL for divorce, filed March 16, 1895, upon the grounds of cruel and abusive treatment and of extreme cruelty. Trial in the Superior Court, before *Fessenden*, J., who ordered that the libel be dismissed, and the libellant alleged exceptions, in substance as follows.

The parties were married on April 2, 1873. Some years ago, after they had lived together pleasantly for many years, the libellee began to use toward the libellant occasional expressions, which increased in frequency until during the last year or two of cohabitation they became common, such as "fool," "idiot," "know-nothing," "no ambition," and "brute." On a few social occasions, at the houses of friends, the libellee called the libellant "fool'" and "idiot." She said to him on two such occasions that "he ought to have more ambition"; that "if he had, he would not be a mere schoolmaster, but would become a professor at Harvard College, and then would have a social position such as he ought to occupy." On another occasion she told him that he ought to elevate himself according to his talents, and that "if he would not be such a fool, he could associate with college professors, and not merely with bankers and brokers." On still another occasion she told him that if he would use his talents as he should, he could rise in the world, and "could have as nice a chair and as nice furniture as were in the room" where they were.

These expressions were used in the presence of third persons.

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The libellant felt humiliated, but said nothing. After their return from a social call, the libellee said to him that he was a "vile wretch," and that "he had n't sense enough to know when he was insulted." What was referred to did not appear. Prior to and down to about April 3, 1893, on frequent occasions after the libellant had retired to bed at night, the libellee talked in a reproachful way to him, and also used the expressions "fool," "idiot," "know-nothing," and "vile wretch."

The libellant was a school teacher in Boston. The language used irritated him, but he suppressed his feelings. He lost sleep, and became affected nervously, in consequence of the libellee's said language and conduct, so that his school work was disturbed to some extent. But he kept on with his work.

The libellant, on April 3, 1893, separated from the libellee, and refused to live with her. He made ample provision for her separate support. She insisted that she should be allowed to live with him, and on one occasion she went to his room in the schoolhouse, and on several occasions to his sleeping apartments, for the purpose of persuading him to permit her to live with him. She wrote and sent letters to him, asking him to allow her to come to him. He refused. On one occasion he told her he would call a policeman to eject her from his apartments if she did not leave. The libellant was kind to the libellee while they lived together. There was nothing in his conduct which justified her language and conduct toward him. The libellee was strongly attached to the libellant. Her feelings toward him were affectionate. She was ambitious for him and for herself. She was nervous, and during the latter part of their cohabitation was affected by physical troubles, arising from her age, in ways which made her unreasonable in her language, and led to the use of the expressions quoted before, and to her conduct.

The libellee had no purpose to harm or injure the libellant, but in part was moved by what seemed to her to be good motives, and by a desire for his success in life, and in part by her nervous condition.

B. N. Johnson, for the libellant.

S. W. Creech, Jr., for the libellee.

ALLEN, J. This case comes to us on a bill of exceptions, and the question is not whether, on the facts stated, the presiding

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justice would have been warranted in granting a divorce, but whether, as matter of law, these facts gave the libellant an absolute right to a divorce. No doubt there may be such an habitual or frequent use of exasperating language as to warrant the granting of a divorce when injury to health follows. *Bailey* v. *Bailey*, 97 Mass. 373. *Holyoke* v. *Holyoke*, 78 Maine, 404. But when cruel and abusive treatment is charged, and the proof consists merely of words spoken, and these words contain no threat of actual violence, the purpose and intent of speaking them may be considered. *W*—— v. *W*——, 141 Mass. 495. In the present case it would seem that the libellee intended to sting the libellant's feelings, and her treatment may well have justified him in living apart from her. But there may be misconduct justifying separation for a while, which will not require the court to grant a divorce. *Lyster* v. *Lyster*, 111 Mass. 327. The facts found did not require the final step of granting an absolute divorce. Though the libellant was affected injuriously in his health to some extent by her acts and words, she had no purpose to harm him in this manner, but in part was moved by what seemed to her good motives, and by a desire for his success in life, and in part by her own nervous condition, she being in reality strongly attached to him, and her feelings being affectionate. The case is by no means so strong as *Kelly* v. *Kelly*, 2 P. & D. 31, 59, where a wife obtained a divorce for a course of too severe moral discipline; or as *Prichard* v. *Prichard*, 3 Swab. & Tr. 523, where a husband obtained a divorce on account of the abusive treatment of his wife, though in this instance there were also some blows, which he did not care to repel with force. In *Johnson* v. *Johnson*, 49 Mich. 639, a case having some resemblance to the present, a series of petty annoyances by the wife, accompanied with words of disparagement of her husband's common sense, were held not to entitle him to a divorce.

On the whole, the decision of the presiding justice must be accepted as final.

Exceptions overruled.

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WILLIAM F. NYE *vs.* HEMAN B. STORER & others.

Suffolk. January 27, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Corporation — Right to let Property for Use unauthorized by Charter — Lease to Directors — Fraud — Equity.

A corporation, which is authorized by its charter to hold real estate, is not restricted, in leasing it to others, to such a use as the corporation itself may make of the property, in the absence of a prohibition in the charter against a lease for the use in question.

A general charge of fraud in a bill in equity, without stating facts in which the fraud consists, is not sufficient.

That a lease of its property by a corporation runs to persons who are directors of the corporation, is a suspicious circumstance, which calls for careful scrutiny, but it does not of itself alone necessarily render the transaction void.

Although there is constructive fraud in a contract made by all the acting directors of a corporation with themselves as individuals which renders the contract voidable, there is no such fraud in a stockholder's voting upon a transaction between the corporation and himself; but such transactions will be set aside upon slight evidence of actual fraud.

BILL IN EQUITY, filed in this court August 1, 1895, by a stockholder and director of the Onset Bay Grove Association, against the officers and other directors and the corporation, for the cancellation of a lease, and for other relief. The defendants demurred to the bill, assigning several grounds of demurrer. At the hearing, the demurrer was sustained, and the bill dismissed; and the plaintiff appealed to the full court. The facts appear in the opinion.

W. B. French, for the plaintiff.

T. E. Grover, for the defendants.

KNOWLTON, J. If we assume in favor of the plaintiff, without deciding, that he has alleged such facts in the conduct of the corporation and its directors as would enable him as a stockholder to obtain relief if it appeared that the acts complained of were illegal, we come to the substance of the charges of illegality. See *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495.

The corporation was established under St. 1877, c. 98, "for

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the purpose of holding personal property and real estate where a wharf, hotel, and other public buildings may be erected, and building lots sold or leased for the erection of private residences or cottages under such rules and regulations as the association may prescribe." The third section provides that "all buildings, booths, or other structures erected on or attached to the grounds of the association shall, for the purposes of taxation, be considered real estate and taxable in the town of Wareham." The bill avers that "the corporation has built a wharf, public buildings, and many private residences or cottages, and its real property is now of great value." It also avers that for many years, during the summer season, the directors have conducted camp meetings and concerts upon the grounds of the company, and it is fairly to be inferred from the bill that a valuable part of the property of the corporation is adapted to this use. It is stated in the bill that the plaintiff has lately objected to the continuance of this business by the corporation, and that he notified the other directors that in his opinion it was illegal. Thereupon a lease of a part of its real estate was executed by the corporation, through the action of its directors, to an association of individuals consisting of the directors other than the plaintiff. At a subsequent meeting of the corporation, at which all the stockholders were represented, the lease was ratified. It is not contended that any of these proceedings were illegal in form, and the principal objection to them is that they are an invasion of the charter of the corporation, inasmuch as the corporation was not authorized to carry on the business of conducting camp meetings for profit, and the effect of the lease is to permit such a business to be conducted by others with the corporation's property.

We are of opinion that this objection is not well founded. The corporation is expressly authorized to hold real estate consisting in part of a wharf, hotel, and other public buildings. The right to hold such property includes the right to lease it so as to make it produce income. Pub. Sts. c. 105, § 6. *Dupee* v. *Boston Water Power Co.* 114 Mass. 37, 43. It would be too strict a construction of the statute to decide that a corporation which may lease real estate for profit can lease it only to be used in those kinds of business which it is authorized by its

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charter to carry on. At the time of making this lease the corporation was in possession of property which for many years had been used in summer for holding camp meetings. We see nothing in its charter to forbid its leasing the property for such a use. There are no facts stated in the bill to support the charge that the lease was made to evade the charter.

The only other ground of objection to the lease is that it was fraudulent. But in this part of the case there are no fraudulent acts charged. It is not charged that the price to be paid was inadequate, or that the directors or corporation acted otherwise than as they deemed for the best interest of the stockholders. The lessees assumed all risks, and agreed to give the corporation one half of the net income. The effect of the lease upon the corporation property not included in the lease was to be considered, as well as other questions of policy. That the plaintiff is prevented from receiving a portion of the surplus earnings and actual profits of the company does not show fraud. It may well be for its pecuniary benefit, and that of every stockholder in the corporation, that a portion of the earnings will be used by the lessees in accordance with the terms of the lease. A general charge of fraud, without stating facts in which the fraud consists, is not enough. *Nichols* v. *Rogers*, 139 Mass. 146. *Other* v. *Smurthwaite*, L. R. 5 Eq. 437, 441. That the lease runs to persons who are directors of the corporation is a suspicious circumstance, which calls for careful scrutiny, but of itself alone it does not necessarily render the transaction void. *Union Pacific Railroad* v. *Credit Mobilier*, 135 Mass. 367, 376. *Kelley* v. *Newburyport & Amesbury Horse Railroad*, 141 Mass. 496, 499, and cases cited. Such a lease may be made in good faith for the best interests of the corporation. It may be avoided or may be ratified by the corporation. Although there is constructive fraud in a contract made by all the acting directors of a corporation with themselves as individuals which renders the contract voidable, there is no such fraud in a stockholder's voting upon a transaction between the corporation and himself. *Northwest Transportation Co.* v. *Beatty*, 12 App. Cas. 589. *Gamble* v. *The Queen's County Water Co.* 123 N. Y. 91. *Bjorngaard* v. *Goodhue County Bank*, 49 Minn. 483. See also *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Pneumatic Gas Co.* v. *Berry*,

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113 U. S. 322; *Conyngham's appeal*, 57 Penn. St. 474. But such transactions will be set aside upon slight evidence of actual fraud.

In the present case the substance of all the charges is that the making of the lease was an evasion of the charter, and, it being established that such a lease might lawfully be made under the charter, no valid objection to the transaction is stated. It is not charged in the bill nor contended in argument that the directors in making the lease intended to obtain a pecuniary advantage for themselves, to the detriment of the other stockholders. *Bill dismissed.*

MARYANN MARCUS *vs.* JOHN H. COLLAMORE & another.

Suffolk. January 27, 1897. — February 26, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Mortgage — Validity of Foreclosure Sale — Advertisement — Adjournment — Findings — Equity.

There is no absolute rule of law that, when the first advertisement of a sale of land under a power in a mortgage fails to bring any one to the sale, it is the mortgagee's duty to advertise again as fully as before.

It is no objection to the validity of a sale of land under a power in a mortgage, that the auctioneer, who saw no one present at the place appointed for the sale, although one person was present in fact, adjourned the sale without reading the advertisement or making a proclamation, especially if, before the sale took place, the fact of such adjournment was published.

At the hearing of a bill in equity to set aside a sale of land under a power in a mortgage, the judge found that there was a breach of condition; that the requirements of the mortgage as to advertisement were fulfilled; that all the proceedings were conducted and the purchase made in good faith; that adjournments of the sale were reasonable, and did not prejudice the plaintiff; that the mortgagee made reasonable efforts to procure and did procure the attendance of *bona fide* bidders; that there was a greater attendance than usual at such sales, and several persons bid; and that, although the property sold for less than its market value, that might have been due to pending litigation. *Held*, that, in view of these findings, this court could not disturb the sale.

BILL IN EQUITY, filed September 18, 1895, against John H. Collamore and Francis M. Learned, to set aside a sale of land in Boston under a power in a mortgage made by the plaintiff to

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one Fuller, and assigned to the defendant Collamore, the other defendant being the purchaser at the sale; and to redeem the premises. Hearing before *Morton*, J., who dismissed the bill, and reported the case for the consideration of the full court. The facts appear in the opinion.

G. P. Wardner, for the plaintiff.

O. B. Mowry, for the defendants.

HOLMES, J. This is a bill to set aside a foreclosure of a mortgage. It is found that there was a breach of condition, that the requirements of the mortgage as to advertisement were fulfilled, and that all the proceedings were conducted and the purchase made in good faith. Before the day fixed for the sale, the plaintiff got a temporary injunction. The auctioneer saw no one present at the appointed place, and there was but one person present in fact. The auctioneer adjourned the sale without reading the advertisement or going through the form of a proclamation, to July 2, and again in like manner, there being no one present, to July 16. The injunction was dissolved on July 13, and the sale was again advertised on July 13 and 15. It is found that the adjournments were reasonable and did not prejudice the plaintiff, that the mortgagee made reasonable efforts to procure and did procure the attendance of *bona fide* bidders, that there was a greater attendance than usual at such sales, and that several persons bid. The property sold for less than its market value, but it is found that that may have been due to pending litigation.

The plaintiff asked for a ruling that the sale was invalid, and argues that, when the first advertisement failed to bring anybody to the sale, it was the mortgagee's duty to advertise again as fully as before. But there is no absolute rule of law to that effect. The first advertisements are required by the mortgage; any other or further duties of the mortgagee are less defined, and are embraced under the general obligation to make reasonable efforts to prevent a sacrifice of the property. *Clark* v. *Simmons*, 150 Mass. 357, 360. *Stevenson* v. *Dana*, 166 Mass. 163, 170.

The other objection pressed is that the auctioneer, although he saw no one present, and whether any one was present or not, ought to have made some proclamation of the adjournment. We do not perceive the advantage of making the validity of a

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bona fide sale depend upon the observation of a particular form outside the requirements of the contract. No doubt it was proper in some way to make public the fact, by posting a notice on the land or otherwise, and this was done efficiently, by further publications, before the sale took place. In view of the findings, we cannot disturb the foreclosure, and do not regard the rulings asked as requiring a more detailed examination.

Bill dismissed.

CHARLES BAKER & another *vs.* DAVID L. BRADT.

Worcester. September 30, 1896. — February 27, 1897.

Present: FIELD, C. J., HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Mortgage — Covenant of Warranty in Deed — Attachment — Foreclosure — Action.

A. conveyed land to B. by a deed which, in the covenant against encumbrances, excepted a mortgage of a certain sum to a third person, but the covenant of warranty was absolute. There were in fact then outstanding two mortgages held by such person amounting to the sum named. B. on the same day executed a mortgage of the land for a smaller sum, containing a power of sale, to A. While the three mortgages were outstanding, C. attached the land as the property of B. A. then sold the premises under the power in his mortgage, for breach of condition, subject to the two prior mortgages, which were afterwards discharged upon payment by the purchaser to the mortgagee. Subsequently to the sale, C. recovered judgment against B., the execution issued thereon was levied on the land, and a deed was made to C. of all B.'s title in the premises on the date of the attachment. *Held*, that C. could not maintain an action against A. for breach of the covenant of warranty in the latter's deed to B.

CONTRACT, for breach of the covenant of warranty in a deed of land in Lowell, made by the defendant to Willoughby Ford. Trial in the Superior Court without a jury, before *Bishop*, J., who ruled that the plaintiffs were not entitled to recover, and ordered judgment for the defendant; and the plaintiffs alleged exceptions. The facts appear in the opinion.

T. G. Kent, for the plaintiffs.

R. B. Dodge, Jr., for the defendant.

LATHROP, J. This is an action of contract for breach of a covenant of warranty contained in a deed of land executed by

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the defendant to one Ford on July 14, 1893. The deed in the covenant against encumbrances excepted a mortgage of $1,600 to Garrett J. Bradt, but the covenant of warranty was absolute. There were in fact then outstanding two mortgages held by Garrett J. Bradt, as guardian for certain minors, one for $1,000, and the other for $600. Ford on the same day executed a mortgage of the land to the defendant to secure the payment of $711, payable on demand.

On September 20, 1893, the three mortgages being still outstanding, the plaintiffs attached the land as the property of Ford, and on May 7, 1894, recovered a judgment against him, on which an execution was duly issued. On May 26, 1894, the land was seized on the execution, and on July 14, 1894, a deed was made to the plaintiffs of all the right, title, and interest which Ford had on September 20, 1893, in the premises.

The mortgage from Ford to the defendant contained a power of sale. There being a default, the defendant, on November 22, 1893, sold the premises, in pursuance of the power, to George A. Hilton, Jr., for $50. The notice contained the clause, "This estate will be sold subject to two prior mortgages of $1,600, and any unpaid taxes and liens for taxes assessed on the same." The estate was duly conveyed to Hilton, subject to the two mortgages for $1,600.

Garrett J. Bradt subsequently died, and the defendant was appointed guardian in his stead; and on November 20, 1894, he received from Hilton the sum due on the two mortgages, and discharged them.

On November 21, 1894, Hilton mortgaged the land to one Bigelow for $2,500, with full covenants.

On these facts the justice, who heard the case without a jury, ruled that the plaintiffs were not entitled to recover.

We are of opinion that this ruling was right. It is true that the covenant of warranty passed to Ford by the deed from the defendant, notwithstanding the exception in the covenant against encumbrances contained in the same deed. *Estabrook* v. *Smith*, 6 Gray, 572. *Ruggles* v. *Barton*, 16 Gray, 151. *Furnas* v. *Durgin*, 119 Mass. 500. It is also true that the mortgage deed from Ford to the defendant, made on the same day, did not reconvey to the defendant all of the interest which Ford took by

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the covenant of warranty. The effect of the deed was to reconvey to the defendant so much of the warranty as was necessary to protect his title as mortgagee, leaving the benefit of the rest of the covenant in Ford. *White* v. *Whitney*, 3 Met. 81. *Cowles* v. *Dickinson*, 140 Mass. 373, 376.

The plaintiffs by their attachment and the subsequent deed to them, took all of the rights which Ford had. If, therefore, Ford or the plaintiffs had paid the mortgage of July 14, 1893, the plaintiffs undoubtedly would have become entitled to maintain an action against the defendant for breach of the covenant of warranty, in case of an eviction. *White* v. *Whitney*, *ubi supra*. But the mortgage to the defendant was prior in time to the attachment. The foreclosure of this mortgage devested any rights which the plaintiffs had to the land by virtue of their attachment. The covenant was one running with the land, and not a personal covenant to any one but Ford. As there was no title to the land left in Ford when the plaintiffs took their deed, they cannot maintain this action. See per *Shaw*, C. J., in *White* v. *Whitney*, 3 Met. 81, 87, 88.

The plaintiffs, however, contend that the defendant had no right as against Ford to foreclose in the manner he did, namely, by selling subject to the two prior mortgages. But the defendant, as we have already stated, was vested with the covenant so far as it was necessary to protect his title, and had a right to sell as he did. *Exceptions overruled.*

MAURICE POWERS *vs.* CITY OF FALL RIVER.

Bristol. October 27, 1896. — February 27, 1897.

Present: HOLMES, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Assumption of Risk — Law and Fact.

If the superintendent of a gang of men employed by a city in digging a trench for water pipes uses a tripod instead of a derrick in hoisting a very heavy stone out of the trench, and does not have planks put across the trench under the stone

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after it has been hoisted above the surface of the ground, so that when the men, under his direction, are engaged in swinging the stone for the purpose of placing it on the ground, the tripod and the stone fall into the trench, carrying with them one of the men who is engaged in steadying a leg of the tripod, and injuring him, in an action against the city for his injury, it cannot be ruled, as matter of law, that the falling of the tripod into the trench was an ordinary risk of his employment, but the question whether he assumed the risk is for the jury.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged negligence of the defendant's superintendent. Trial in the Superior Court, before *Bishop*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff was working for the defendant in its waterworks department at the time of the accident, and had been so employed in picking, shovelling, and drilling from April, 1895, to the time of the accident, which was on June 25, 1895. It also appeared that he had done the same kind of work for five or six months of the previous year. On the day of the accident he was engaged with other workmen in digging a trench for water pipes. This work was done under the direction of one Lynch, who acted as foreman and who did nothing but direct the work. Among other appliances used by the defendant in the progress of the work were sheer poles, which consisted of three stakes about five inches square and fourteen feet and one inch high, joined together at one end and capable of being spread out in the form of a tripod. A piece of iron pipe ran through one of the legs of the sheer pole, forming a handle. The sheer poles were extended across the trench when in use, two legs being on one side and one on the other, and from the apex were suspended blocks and a fall which could be lowered into the trench. While they were in this position the plaintiff was ordered by Lynch to steady the leg of the sheer poles that was on one side of the trench. He did so by taking hold of the iron pipe with each hand, putting all his weight on the handles. The foreman then ordered one of the workmen to chain a stone which was in the trench and to hook it on to a block attached to the sheer poles, and ordered other workmen to hoist. When the stone was hoisted a certain distance, he directed other workmen to swing the stone three times for the purpose of landing it on the

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ground, and on the third swing ordered some of the men who had hold of the fall to slack up and lower the stone, when the sheer poles and the stone tipped over into the ditch, carrying the plaintiff with them, and he received the injuries complained of.

The plaintiff testified that he did not have time to let go of the pole and get away; that he did not know there was any danger in holding the pole as he was doing, or that it was liable to fall in that way; and, on cross-examination, that he was performing his work as directed by Lynch.

Michael Garrity, who was employed on the same job at the time of the accident, testified that he had been doing trench work six or seven years; that on the day of the accident he was at work in the bottom of the trench barring out stone; that there was a derrick in use at the trench as well as the sheer poles; that this derrick had also three legs, but that two of them were fastened together by a plank, and it was fitted with a wheel to hoist stone, instead of the men hauling by hand; that the derrick could be moved from place to place by the men; that the derrick could have been moved to the place of the accident with comparative ease; that he had several times seen the derrick in use, and moved from place to place, on that job, under the orders of Lynch; that he had seen the derrick used for lifting out heavy stone; that it was always used for stones of the size of that which was being hoisted at the time of the accident, and he had never before seen an attempt to lift a stone of that size by the sheer poles; that the derrick was the safest, and was steadier and securer than the sheer poles for lifting any kind of rock; that he helped to load this stone on a gear after the accident, and that it was of granite, and it took five men to put it on the gear; and that from where the plaintiff stood holding the sheer pole he could not see the stone down in the trench.

Dennis Norton testified that he had worked in trenches about two years, and during that time had had occasion to see stones of different sizes lifted from ditches; that he was working on this job; that Lynch was in charge of the work, and had fifty men under him; that the stone in question would weigh somewhere between eight and ten hundred pounds; that he had seen the sheer poles used there before, but had never seen them used

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for lifting a rock of that size, the derrick being used for that purpose; that he was one of the men who had hold of the tag rope pulling the rock in, and they were pulling it in the ordinary way; that the ditch there was about eight or nine feet deep; and that from where the plaintiff stood holding the sheer pole he could not see the stone down in the trench.

On cross-examination, Norton testified that the pull on the third swing is less than the pull on the first, because they have to pull harder to get the rock started; and that it was the drawing on the sheer poles, landing the rock on the bank, which caused them to tip over. In reply to the question, "What was the cause of the accident?" the witness replied, "I don't think the sheer poles were heavy enough for that rock."

Michael Lynch testified, for the defendant, that he had been foreman for the city on this kind of work twenty years; that for sixteen years he had used sheer poles; that he had taken out stones as large as this one, and larger, with them; that he had been accustomed to take out stones with the derrick, the sheer poles, and the tag rope; that this stone was one which it was proper to take out with the sheer poles; that this stone was the only one at that point to take out; that he used the sheer poles to lift out this same stone right after the accident; that at the time of the accident the single leg came over the ditch; that the plaintiff did not come over with it; that he was not on the leg when it went towards the ditch; that he used the derrick for heavy stone and the sheer pole for light stone; and that for a stone weighing one thousand pounds he would use the derrick.

On cross-examination, Lynch testified that the single leg which the plaintiff was holding rested on earth that had been thrown up out of the trench, and was about eighteen inches higher than the two legs on the other side, and they were pulling away from the single leg trying to get the stone between the two legs; that they pulled in obedience to his orders; that the witness saw the stone in the bottom of the trench, as he was standing right over it; and that the plaintiff was doing what the witness told him to do, so far as he knew.

Quin O'Neil, called by the defendant as a witness, testified that he was holding the fall at the time of the accident; that

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he was not pulling on it, but holding it still, and the sheer poles did not go into the ditch; that they took out this same stone immediately after with the same sheer poles; that he had worked for the city one year; and that during that time he had seen sheer poles used, and had seen stones as large as that one taken out with the sheer poles.

James Corrigan, called as a witness by the defendant, testified that he was one of the laborers on the job, and this was the largest stone they took out at that spot; that he had worked for the city ten years; that during that time he had seen sheer poles used; and that he had seen stones as large as this one taken out with sheer poles.

Edmond L. Gifford testified, for the defendant, that he had been a contractor and mason, and had worked sheer poles for something like thirty years; and that sheer poles fourteen feet high with legs five inches square were a proper appliance for taking out a stone weighing one thousand pounds.

Robert Nicholson, a master mason of twenty-four years' experience, and admitted to be qualified as an expert in the use of sheer poles, was called as a witness by the defendant and testified on cross-examination as follows:

"*Q.* Do you think that that appliance as it stood there with the single leg resting on loose earth eighteen inches high, and a stone weighing one thousand pounds on there, was a suitable and proper way to hoist? *A.* It is not a suitable way to have the derrick sitting at all.

"*Q.* Should n't there be a skid there, something else to help take the stone up? *A.* I can tell you the way I land them.

"*Q.* Yes, sir; go ahead. *A.* If I am using the three legs I generally have stuff there to put under the stone when I get it to the bank.

"*Q.* So that you would not have to swing? *A.* Yes, sir, that is just what ought to be.

"*Q.* That is what ought to have been done here? *A.* Yes, sir."

At the close of the evidence, the defendant asked the judge to rule that there was no evidence which would justify a verdict for the plaintiff. The judge refused so to rule; and the defendant excepted.

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The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

L. E. Wood, for the defendant.

J. W. Cummings, (*E. Higginson* with him,) for the plaintiff.

LATHROP, J. The work which was going on at the time of the injury to the plaintiff was under the direct supervision and control of a foreman of the defendant, who it is conceded was a superintendent within the meaning of the statute, and there was evidence that his sole duty was that of superintendence. The plaintiff did precisely what he was told to do, and it is not contended that he was not in the exercise of due care. There was evidence of negligence on the part of the superintendent in at least two particulars; first, in using the tripod instead of the derrick in hoisting so large a stone out of the trench; and, secondly, in not putting planks across the trench under the stone after it had been hoisted above the surface of the ground. If this had been done, the stone could have been lowered to the planks, and removed without further use of the tripod. The swinging in of the stone to the surface of the ground would then have been unnecessary, and the catastrophe would have been avoided.

The principal contention of the defendant at the argument in this court was that the plaintiff took the risk. He undoubtedly took the ordinary risks of his employment, but it cannot be said, as matter of law, that the falling of the tripod into the trench was an ordinary risk. It was for the foreman to determine which appliance to use, the tripod or the derrick. The plaintiff had a right to rely to some extent upon the experience of the foreman, even if he knew all the conditions, which does not clearly appear. On all the evidence we are of opinion that the question whether the plaintiff assumed the risk was for the jury. *Haley* v. *Case*, 142 Mass. 316. *Lang* v. *Terry*, 163 Mass. 138. *Coan* v. *Marlborough*, 164 Mass. 206. *Norton* v. *New Bedford*, 166 Mass. 48.

Exceptions overruled.

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CHARLES L. FOSS *vs.* LEON I. HARTWELL.

Essex. November 4, 1896. — February 27, 1897.

Present: ALLEN, MORTON, LATHROP, & BARKER, JJ.

Contract neither Express nor Implied for Support of a Child.

If a child, having been taken away from his father, without right, by the mother, who has married another man, voluntarily elects, when the choice is given him, to stay with his mother in her new home and her husband chooses to receive him, the husband has no right, without communicating with the father, to look to him for the child's support.

CONTRACT, for board and clothing furnished to the defendant's minor son, from March, 1891, to June, 1893. Trial in the Superior Court, before *Sherman*, J., who, at the close of the evidence for the plaintiff, ruled, at the defendant's request, that the action could not be maintained, and reported the case for the determination of this court. If the ruling was correct, the verdict was to stand; otherwise, a new trial was to be granted. The facts appear in the opinion.

J. C. Sanborn, for the plaintiff.

W. L. Thompson, for the defendant.

LATHROP, J. The facts appear to be as follows. The defendant obtained a divorce from his wife in 1889, on the ground of her desertion. The custody of the son was awarded to neither of the parties, and neither asked for it. Both parties married again, the woman becoming the wife of the plaintiff. The boy, at the time of the divorce, was staying with his grandmother. Subsequently, in 1889, he went to live with his father, and was with him about two years, and attended school. On his way home from school, in 1891, he was met by his mother, who took him to the home of the plaintiff. The plaintiff's wife wrote to the defendant's wife a letter, stating that she had taken the boy home with her, and requesting that his trunk be sent to him. Some days afterwards the defendant, who had been away from home, returned, and it was arranged that an interview should take place between him and his son. The defendant, at this interview, asked his son what he intended to do. The boy

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answered, "I come to see you about going away to school." The defendant said, "Well, the schools of Lawrence were good enough for me, and must be good enough for you." The boy said, "All right." The defendant then asked him with whom he preferred to live, his mother or himself, and the boy said that, if he was not going to be sent away to school, he preferred to live with his mother. The defendant replied, "Very well, I will send your things to-morrow." On the following day the trunk and personal effects of the boy were sent to him at the plaintiff's house. The boy at this time was thirteen years old. From that time until this action was brought, neither the plaintiff nor his wife made any demand upon the defendant for the support of the boy, or had any communication with him upon the subject.

There was no express contract on the part of the defendant to pay the plaintiff for the support of his child; and we are of opinion that the jury would not have been warranted in finding that there was any implied contract. While the boy was living with his father, and was supported by him, his mother saw fit surreptitiously to take him to her home, and there he continued to live down to the time this action was brought. The boy was given the choice with whom he would live, and he selected his mother. The most that can be said in favor of the plaintiff is that the father did not dissent from this arrangement. Under some circumstances, where a man and wife are living apart, it may be that the man may be liable for the wife's support, and for his child's support. This is undoubtedly true where the wife leaves for a justifiable cause, and takes her infant child with her. *Reynolds* v. *Sweetser*, 15 Gray, 78. *Bazeley* v. *Forder*, L. R. 3 Q. B. 559. But he is not so liable where she leaves without justifiable cause. *Baldwin* v. *Foster*, 138 Mass. 449. Nor is he liable when the custody of the child is given to the wife by a decree of court. *Brow* v. *Brightman*, 136 Mass. 187.

We have no occasion to consider whether or not, at common law, a father is bound to support his minor child, or whether the obligation is merely a moral one. If there is a legal obligation, it must rest upon the ground that he is entitled to the custody, the society, and the services of the child. He must also have the right to determine where his child shall live. If a son

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chooses to leave voluntarily his father's house and live elsewhere, his father is not responsible for his support. *Angel* v. *McLellan*, 16 Mass. 28. So, if a child is induced by another to leave his father, without any necessity for so doing, the person thus influencing him to leave would, in case he should furnish supplies, have no cause of action against the father. *Dodge* v. *Adams*, 19 Pick. 429, 432.

There is nothing in the case before us to show any abandonment of the child by the father. It is simply the case of a child taken away from his father, without right, by the mother, and then voluntarily electing, when the choice was given him, to stay with his mother in her new home. If the plaintiff chose to receive him, he had no right, without communicating with the defendant, to look to the father for the boy's support.

Verdict to stand.

ROSIE RUCHINSKY *vs.* JONATHAN G. FRENCH & another.

Essex. November 5, 1896. — February 27, 1897.

Present: ALLEN, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Warning and Instructions as to Use of Dangerous Machine — Negligence.

An employee, thirty years of age and of ordinary intelligence, who knows nothing of the dangers of the machine upon which he is working and who is not familiar with machinery, cannot recover of his employer for injuries occasioned to his hand by being caught in revolving cog wheels, if the employer had a right to assume that the employee had that knowledge which is acquired by common experience, and was under no obligation to warn him that if he put his hand between the wheels he would be hurt; and the fact that his employer told him to work "quick" cannot be regarded as evidence of negligence.

TORT, for personal injuries occasioned to the plaintiff while in the defendants' employ. At the trial in the Superior Court, before *Sherman*, J., there was evidence tending to show that at the time of the accident the plaintiff was engaged in pulling squares of pasted leather, in size about twenty-four inches by eighteen inches and about an inch thick, through the rollers of

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a splitting machine, under the immediate personal direction of one of the defendants, who was passing the leather squares between and through the rollers of the machine; that at each end thereof, on the side where the plaintiff was at work when injured, and in plain sight, were cog wheels which were unguarded, the space about the machine being sufficiently lighted; that the machine, which was similar to a rolling mill machine, consisted of an upper and an under cylinder or roller, each turned by cog wheels on either end of the machine, which were connected with power by ordinary pulley wheels; that there was also a knife or blade between the rollers which served to split or skive the leather squares as they were put through the rollers; that one of the defendants stood on one side of the rollers and inserted between them the leather square, and the plaintiff, who stood on the opposite side, took hold of the leather square as soon as it appeared through the rollers, and pulled it completely through, the square being split by the knife during the process of going through the rollers, and a portion of it falling to the floor; and that when the square had been pulled entirely through by the plaintiff, it was her duty to put it on the floor to her left, and while doing this it was natural and reasonable for her to pass her hands very near the cog wheels of the machine.

It also appeared that the plaintiff was of ordinary intelligence, and at the time of the accident, which occurred on November 8, 1894, was thirty years old, understood the English language imperfectly, and was unfamiliar with machinery. She had never been in a factory before, and had been in the defendants' factory one day and a half at the time of the accident.

The plaintiff testified that, being called to this machine by one of the defendants in the early afternoon, she was directed by him to take hold of the leather as it came through the rollers, to pull upon it, and to lay it on the floor at her side when she had pulled it through; that she had never observed the machine or its working before; that she knew nothing of its dangers, and was given no warning as to its dangers, and no instructions as to the working of the machine; that she commenced pulling the leather squares through the machine, and was told by the defendant, working on the opposite side of the machine, to work "quick"; that thereupon she hurried in her work, and had

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pulled a few pieces of the leather through, and laid them on the floor, when she caught her hand in the cogs of the wheels of the machine on her left. She further testified that, while she was taking the leather squares from the rollers and putting them on the floor, these cogs were hidden from her view by the leather squares in her hands, and that she had not noticed them during the short time in which she was at work at the machine, and that her hand was caught in the cogs after she had laid a leather square upon the floor and was bringing her hand back to the machine to pull another square through.

The judge, at the request of the defendants, directed a verdict for the defendants; and the plaintiff alleged exceptions.

E. B. Fuller, for the plaintiff.

B. B. Jones & M. A. Pingree, for the defendants.

LATHROP, J. The plaintiff in this case does not contend that the defendants were in fault in not guarding the cog wheels. Her contention is that she should have been warned, when set to work upon the machine, that there were cog wheels upon the sides, and that if she got her hands into them she would be hurt. The cog wheels were in plain sight, and there was no hidden danger. The plaintiff was thirty years old, and of ordinary intelligence. While she testified that she knew nothing of the dangers of the machine, and the exceptions state that she was unfamiliar with machinery, the defendants had a right to assume that she had that knowledge which is acquired by common experience, and were under no obligation to warn her that if she put her hand between revolving cog wheels she would be hurt. *Ciriack* v. *Merchants' Woolen Co.* 151 Mass. 152, 156, and cases cited. *Stuart* v. *West End Street Railway*, 163 Mass. 391.

The work which the plaintiff was set to do was pulling squares of leather through a machine, and placing them on the floor. The plaintiff contends that the case should have been submitted to the jury, because one of the defendants told her to work "quick," and she hurried in her work; and, after she had pulled a few pieces of leather through, her hand was caught. But we do not see that the fact that she was told to work "quick" was, under the circumstances of the case, evidence of negligence on the part of the defendants. *Ciriack* v. *Merchants' Woolen Co.* 146 Mass. 182. *Exceptions overruled.*

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L. VERNON BRIGGS *vs.* LOUIS T. CUSHING.

Suffolk. November 23, 1896. — February 27, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Promissory Note purchased in Good Faith for Value before Maturity.

In an action by the holder of a promissory note against the payee who indorsed it, the latter has no ground of exception to a refusal to rule that, upon all the evidence, the plaintiff is not entitled to recover, if it is competent for the judge trying the case without a jury to find upon the evidence that the plaintiff purchased the note, in good faith, for value before its maturity, and the judge so finds.

CONTRACT, upon a promissory note for $800, dated August 2, 1893, payable in four months after date to the order of the defendant, signed by Moyses R. Simmons and indorsed by the defendant, by Eben C. Waterman, and by the plaintiff. The answer set up want of consideration, and that the plaintiff was not a *bona fide* holder for value. Trial in the Superior Court, without a jury, before *Mason*, C. J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that he purchased the note of Waterman for seven hundred and fifty dollars, on November 19, 1893, who told him that he had received the note in payment for a house; that he had previously made inquiries at several banks as to the financial standing of the defendant, and had called at the defendant's office to make inquiries of him about the note; and that at the time of the purchase he believed the note to be all right, and had no other information in regard to it.

Waterman testified that he received the note in payment for a house at Scituate beach; that he told the plaintiff of this fact when he sold him the note, and also all he knew about the defendant's financial standing; that the defendant told him that Simmons had no right to use the note in the way he had used it, and that he, Waterman, had not given a deed of the house, as he did not think it necessary.

The defendant testified that he indorsed the note and gave it to Simmons for the purpose of raising money to pay the bills

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of a corporation in which they were both interested, and that, when he learned in November that Simmons had given the note to Waterman in payment for the house, he told Waterman that he should use every honorable means to avoid payment.

The defendant asked the judge to rule that, upon all the evidence, the plaintiff was not entitled to recover, and that the plaintiff was not a *bona fide* holder for value before maturity of the note. The judge refused so to rule, and found for the plaintiff. The defendant alleged exceptions.

J. W. Keith, for the defendant.

C. M. Perry, for the plaintiff.

FIELD, C. J. The note was signed by Simmons, and dated August 2, 1893, payable in four months after date to the order of Cushing, the defendant, and by him indorsed in blank, and also afterwards indorsed in blank by Waterman. The case was tried by the court without a jury. It is plain that the court could find, from the testimony of the plaintiff which is set out in the exceptions, that the plaintiff purchased the note in good faith, for value, before its maturity, and that having found this it could not rule that the plaintiff was not entitled to recover.

Exceptions overruled.

EDWARD B. MERRILL & another, executors, *vs.* LEONARD F. BECKWITH.

Suffolk. December 4, 1896. — February 27, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Equity Practice — Entry on Docket of Court — Decree — Amendment of Suit into Action at Law — Discretion of Court.

An entry on the docket of this court, sitting for the county, in accordance with the direction in a rescript of the full court, of "Bill dismissed, with costs," is not a final decree, and, no formal decree having been extended or entered, it is within the discretion of the court to allow a motion to amend the suit, which is a bill in equity for the specific performance of a contract, into an action at law for damages for breach of the contract.

BILL IN EQUITY, for specific performance of a contract for the purchase of land. The plaintiffs moved to amend the suit into

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an action at law. Hearing before *Knowlton*, J., who granted the motion; and the defendant appealed to the full court. The facts appear in the opinion.

J. L. Thorndike, (*R. E. Forbes* with him,) for the defendant.

E. D. Stetson, for the plaintiffs.

FIELD, C. J. This suit was originally a bill in equity for the specific performance of a contract on the part of the defendant to purchase land. The bill was inserted in a writ of summons and attachment on which an attachment of real property was made, but there was no service of a summons upon the defendant personally within the Commonwealth, and the defendant was described in the writ as of "the city, county, and State of New York." The defendant moved to dismiss the suit for want of sufficient service, and on October 23, 1894, a single justice of this court granted the motion, the entry on the docket being "Bill dismissed." On October 30, 1894, the plaintiffs appealed from this order to the full court, which, on May 24, 1895, sent down a rescript as follows: "Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz. Bill dismissed, with costs"; and this entry was made on the docket of the court sitting for the county. See *Merrill* v. *Beckwith*, 163 Mass. 503. On May 31, 1895, the plaintiffs filed in the court sitting for the county the following motion: "And now come the plaintiffs, after rescript from the full bench, and before final judgment or decree therein, and move that the above entitled proceeding in equity be changed to an action at law." This motion was granted, upon terms, on June 18, 1895, and the defendant appealed to this court. The justice who granted the motion reports the following facts, among others, viz.: "The plaintiffs desired to convert the suit into an action for damages for breach of the contract, and thereby to preserve the attachment as security for the judgment they might recover, alleging that subsequent attachments had been made by other persons. The defendant moved that execution issue for costs. Both motions were heard before me, and I gave the plaintiffs leave to amend as prayed, on payment of costs. The defendant having appealed from this order, I make this report of the facts." The order of the single justice is as follows: "I am of opinion that the rescript and the execution by the

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clerk of the order contained in the rescript do not constitute a final decree within the meaning of our law and practice. I therefore think the plaintiffs should be permitted to amend the suit into an action at law, upon payment of the costs of the defendant to the present time. It is so ordered."

Amendments may be allowed at any time before final judgment changing an action at law into a suit in equity, or a suit in equity into an action at law. Pub. Sts. c. 167, §§ 42, 43. St. 1883, c. 223, § 17. If this had been an action at law originally, an order permitting it to be amended into a suit in equity under the circumstances stated would have been within the discretion of the presiding justice. *Terry* v. *Brightman*, 133 Mass. 536. *Gray* v. *Cook*, 135 Mass. 189. *Gale* v. *Nickerson*, 144 Mass. 415.

We infer that a decree dismissing the bill, or dismissing the bill with costs, never was formally drawn up and signed either by a justice of the court or by the clerk, and that such a decree was never extended in any form, but that the only entries of a decree were the docket entries. If these entries can be considered as only orders for a decree, which never has been drawn up or extended in due form, then the motion to amend was seasonably filed. See *Thompson* v. *Goulding*, 5 Allen, 81.

The defendant relies upon *Snell* v. *Dwight* and *Dunham* v. *Presby*, 121 Mass. 348. In one of these cases a rescript was sent down on March 1, 1876, "Bill dismissed," and no other decree was entered; in the other case a similar rescript was sent down on May 6, 1876, and on May 16, 1876, a decree dismissing the bill was extended in due form. The petitions to amend the record in each case were presented on November 14, 1876. The court say: "These petitions come too late. By our practice, an entry upon the docket, in a suit in equity, of 'Bill dismissed,' is of itself a final decree; and a more formal order, though convenient and proper for the regular completion of the record, is not essential, and, if afterwards drawn up, is a mere extension of the final decree already entered, and has relation to the time of the entry of that decree. *Foote* v. *Gibbs*, 1 Gray, 412. *Winslow* v. *Otis*, 5 Gray, 360, 364. *Clapp* v. *Thaxter*, 7 Gray, 384. Eight months therefore elapsed in one of these cases, and six months in the other, after the final decree, before any motion was made to amend the record." But from the opinion we infer

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that the full court thought that it was within its power to grant the petitions, if in its opinion justice required it to be done.

In general, the rescript of the full court directing a decree to be entered is an order for a decree, but not the decree itself. *Sewall* v. *Sewall*, 130 Mass. 201. There seems to be no reason why a rescript ordering a bill to be dismissed, with or without costs, should be treated differently from any other rescript ordering a different decree to be entered, except that there is a common form for a decree dismissing a bill unless the court orders that the decree shall contain recitals showing the grounds on which the court proceeds in dismissing the bill.

A petition for a rehearing of a suit in equity after a decision by the full court is addressed exclusively to the discretion of the full court. *Winchester* v. *Winchester*, 121 Mass. 127. *Lincoln* v. *Eaton*, 132 Mass. 63. A petition for a rehearing of a suit in equity decided by the court held by a single justice, in which no appeal has been taken, in general must be presented before the decree has been formally drawn up and enrolled. *Thompson* v. *Goulding*, *ubi supra*. *Clapp* v. *Thaxter*, 7 Gray, 384.

In *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548; *S. C.* 154 Mass. 305, the bill was ordered to be dismissed in the Superior Court by a rescript of the full court, but afterwards a petition for a rehearing was granted in the Superior Court, the agreed facts were amended, the case again heard and an appeal again taken to the full court, and upon the new case the decision was for the plaintiff, but it does not appear that the right of the Superior Court to grant the rehearing was considered by this court.

In the present case it does not appear that any formal decree dismissing the bill ever has been entered. If it had been entered by a single justice, the rescript of the full court altered the decree by ordering the bill to be dismissed with costs, and a decree never has been formally entered in accordance with the rescript of the full court. The rescript of "Bill dismissed" is undoubtedly a sufficient direction to the clerk to enter a formal decree to that effect, in common form, if the parties apply for it, and in making up the records the clerk would be authorized to extend the decree in the usual form, if the court where the cause is gave no direction to the contrary. We think however, that, notwithstanding what has been said in *Snell* v. *Dwight*, 121 Mass.

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348, the single justice was right in holding that the rescript in this case was a direction for a decree, and that the entry on the docket was not a formal decree, and therefore that, the decree not having been extended in any form, it was within his discretion to allow the motion. We have no doubt that it was competent for the single justice to find that the amendment was asked for to enable the plaintiffs "to sustain the action for the cause for which it was intended to be brought." Pub. Sts. c. 167, § 42. The plaintiffs sued for a remedy for the alleged breach of a contract by the defendant; for specific performance if they could get it; otherwise, for damages. The order of the single justice should be affirmed. *So ordered.*

EUDORA T. BARKER *vs.* SOPHIA M. MACKAY.

Middlesex. December 4, 1896. — February 27, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Redemption of Land sold for Non-payment of Taxes — Jurisdiction of Superior Court.

The Superior Court has no jurisdiction of a bill in equity to redeem land sold by the collector of taxes for the non-payment of taxes.

BILL IN EQUITY, filed in the Superior Court September 8, 1895, to redeem certain land in Boston, which was sold by the collector of taxes on September 17, 1890, for non-payment of taxes. Trial in the Superior Court, before *Dunbar*, J., who refused to rule, as requested by the defendant, that the court had not jurisdiction, and reported the case for the determination of this court. If the Superior Court had jurisdiction, the decree was to be affirmed; otherwise, the bill was to be dismissed, with costs.

E. H. Pierce, for the defendant.

W. Odlin, for the plaintiff.

LATHROP, J. In *Mitchell* v. *Green*, 10 Met. 101, argued in 1845, it was held that the Supreme Judicial Court had no juris-

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diction in equity of a bill for the redemption of land sold for payment of taxes. The remedy was to tender the amount due, and, if the tender was refused, to bring a writ of entry. *Rand* v. *Robinson*, 11 Cush. 289.

By the St. of 1849, c. 213, § 2, it was provided, "In all cases of sales of real estate for the payment of taxes, the Supreme Judicial Court shall have full equity powers." Under this statute, the court exercised the power granted. *Simonds* v. *Towne*, 4 Gray, 603. See also *Rand* v. *Robinson*, *ubi supra*.

By the St. of 1856, c. 239, § 4, it was provided: "In all cases of sale of real estate for the payment of taxes assessed thereon, the Supreme Judicial Court shall have equity powers, provided relief be sought within five years from such sale." By § 6, the St. of 1849, c. 213, is repealed.

The St. of 1856 appears in the Gen. Sts. c. 12, § 42, with no material change of language. Chapter 12 relates to the collection of taxes. There is no specific mention of the subject in § 2 of c. 113, which relates to the general equity jurisdiction of the court. *Faxon* v. *Wallace*, 98 Mass. 44, and *Gladwin* v. *French*, 112 Mass. 186, were decided under the Gen. Sts. c. 12.

In the Public Statutes the provision again appears in the chapter relating to the collection of taxes; Pub. Sts. c. 12, § 66; and does not appear in c. 151, which relates to the general equity jurisdiction of this court.

By the St. of 1877, c. 178, § 1, it was provided: "The Supreme Judicial Court shall have jurisdiction in equity of all cases and matters of equity, cognizable under the general principles of equity jurisprudence; and in respect of all such cases and matters, shall be a court of general equity jurisdiction." This is now incorporated in the Pub. Sts. c. 151, § 4.

The Superior Court first obtained jurisdiction in equity by the St. of 1883, c. 223. Section 1 provides: "The Superior Court shall have original and concurrent jurisdiction with the Supreme Judicial Court in all matters in which relief or discovery in equity is sought, with all the powers and authorities incident to such jurisdiction." By § 2, it is provided that all the sections of the Pub. Sts. c. 151, except certain sections named, among which is § 1, shall apply to suits in equity in the Superior Court.

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Section 1 of the Pub. Sts. c. 151, provides: "In addition to the jurisdiction in equity otherwise conferred, the Supreme Judicial Court shall have original and exclusive jurisdiction," etc.

The St. of 1888, c. 390, entitled "An Act to amend and codify the statutes relating to the collection of taxes," by § 95, expressly repeals, among other acts, the Pub. Sts. c. 12, but the same section provides: "The provisions of this act, so far as they are the same as those of existing laws, shall be construed as a continuation of such laws, and not as new enactments." Section 76 is as follows: "In all cases of taking or sale of real estate for the payment of taxes assessed thereon, the Supreme Judicial Court shall have equity powers, if relief is sought within five years from the taking or sale." This is simply a repetition of the Pub. Sts. c. 12, § 66, and, according to the language of § 95, is to be construed as "a continuation of such laws." It would seem, therefore, that, if the Superior Court had jurisdiction of such a petition as the one before us, such jurisdiction would not be repealed by implication by § 76. It is unnecessary, however, to decide this point, for we are of opinion that the Superior Court never had such jurisdiction.

The effect of the St. of 1883, c. 223, § 1, was considered in *Baldwin* v. *Wilbraham*, 140 Mass. 459, where it was held that a petition by ten taxable inhabitants of a town, to restrain the town from an illegal expenditure of money, could not be brought in the Superior Court. It was said by Chief Justice Morton: "The language of the statute is broad, and, without doubt, it was intended to confer upon the Superior Court concurrent jurisdiction in equity in all suits between individuals involving private rights, of which the Supreme Judicial Court has jurisdiction by virtue of the general principles of equity jurisprudence. But there are numerous provisions of our statutes which confer upon the Supreme Judicial Court, sitting as a court of equity, certain special powers and duties not within the general jurisdiction of a court of equity." One reason given for reaching the conclusion that the Superior Court had not jurisdiction of such a petition is, that it is not included in the enumeration of the equity powers which are given to the Superior Court in the Pub. Sts. c. 151, § 2, and that § 2 of the St. of 1883 expressly excepts § 1 of the Pub. Sts. c. 151. The case of *Baldwin* v.

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Wilbraham has been followed in *Steele* v. *Municipal Signal Co.* 160 Mass. 36, which was also a petition by ten taxpayers of a town, and in *Langmaid* v. *Reed*, 159 Mass. 409, where it was held that the Superior Court had no jurisdiction in equity of the power conferred by the Pub. Sts. c. 102, § 39, to prevent the erection, occupancy, or use of a building as a stable for more than four horses. Jurisdiction has, however, since been given to the Superior Court in such a case by the St. of 1890, c. 395.

The reasoning of the court in *Baldwin* v. *Wilbraham*, and in the cases which have followed it, apply to the case at bar. Moreover, we have been referred to no case or text-book, and we have found none, in which a petition to redeem land from a valid sale for taxes has been held to be within the general powers of a court of equity.

There are some cases cited by the plaintiff which may be briefly disposed of. *O'Day* v. *Bowker*, 143 Mass. 59, was brought in this court, and not in the Superior Court. In *Ladd* v. *Chase*, 155 Mass. 417, the bill was treated by the court as one filed by an executor for instructions, and so was held to be within the general equity jurisdiction of the Superior Court.

The case of *Smith* v. *Smith*, 150 Mass. 73, which was not cited by the plaintiff, decided that the Superior Court had, under its general equity powers conferred by the St. of 1883, jurisdiction of a bill in equity to remove a cloud upon title resulting from an invalid tax sale, the statute which we have considered in the case at bar being held applicable only to valid tax sales.

In *Stone* v. *Stone*, 163 Mass. 474, no question of the jurisdiction of the Superior Court was raised by the defendant or considered by this court.

According to the terms of the report the order must be,

Bill dismissed, with costs.

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COMMONWEALTH *vs.* GLOBE INVESTMENT COMPANY. IN RE PETITION OF WILLIAM A. RUST.

Suffolk. December 9, 1896. — February 27, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Mortgage — Assignment — Agreement not to Record — Fraudulent Discharge by Assignor and Taking new Mortgage and Note — Right of Purchaser of new Note to Assignment of Mortgage — Equity.

An investment company assigned to a trust company certain mortgage deeds and notes to secure debenture bonds of the former, and, by an agreement between them, the assignments of the mortgages were not recorded. The investment company subsequently discharged these mortgages without the knowledge of the trust company, and these discharges were recorded. The investment company afterwards took new notes secured by new mortgages upon the respective pieces of land covered by the former mortgages; and these notes were sold to A. before maturity. *Held*, that A. was entitled, as against the trust company, to have the new mortgages assigned to him.

PETITION, filed May 1, 1896, by William A. Rust, a creditor of the Globe Investment Company, to obtain an assignment of certain mortgages by the receiver of the corporation. The Boston Safe Deposit and Trust Company filed an answer, setting up a first lien upon the lands conveyed by the mortgages under assignments by the Globe Investment Company of prior mortgages of the same lands; and alleging that the later mortgages should be cancelled, or delivered to the Boston Safe Deposit and Trust Company, and not to the petitioner, or held by the Globe Investment Company or its representatives in trust for the Boston Safe Deposit and Trust Company. Hearing before *Allen*, J., who entered a decree for the petitioner; and the Boston Safe Deposit and Trust Company appealed to the full court. The material facts appear in the opinion.

S. Lincoln, for the Boston Safe Deposit and Trust Company.

W. B. Durant, for the petitioner.

LATHROP, J. By the decree of a single justice of this court, it was ordered that the receiver of the Globe Investment Company transfer and assign to the petitioner, William A. Rust, all the interest which he had as receiver, and all the interest of the Globe Investment Company, in and to certain twelve mortgages of parcels of land in the West, and pay over to the petitioner all

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sums of money paid to the receiver on account of said mortgages, or on account of the notes thereby secured. The receiver has not appealed from this decree, and the only question before us arises from the conflicting claim of the Boston Safe Deposit and Trust Company, so far as the mortgages given to secure five of these notes are concerned.

In 1888, the investment company assigned to the trust company certain mortgage deeds and notes to secure debenture bonds of the investment company; and, by an agreement between the two companies, the assignments of the mortgages were not recorded. The investment company subsequently discharged these mortgages, without the knowledge of the trust company, and it is conceded that these discharges were recorded. The investment company afterwards took new notes, secured by new mortgages upon the respective pieces of land covered by the former mortgages; and these notes were sold to the petitioner.

The decree expressly states that it makes no adjudication as to the relative priority of the mortgages between the petitioner and the trust company; and the question before us is whether the petitioner is entitled to have the new mortgages assigned to him. We are of opinion that he is so entitled.

As nothing appears to the contrary we must assume, in favor of the decree below, that the notes which the petitioner received were received by him before they were due, and that there was nothing on the face of them to put the petitioner on inquiry. He then stands as the legal holder of the mortgage notes, and is equitably entitled to assignments of the mortgages given as security for the notes. *Sturtevant* v. *Jaques*, 14 Allen, 523, 527. *Morris* v. *Bacon*, 123 Mass. 58. *Barnes* v. *Boardman*, 149 Mass. 106, 114. *Carpenter* v. *Longan*, 16 Wall. 271. See also *Watson* v. *Wyman*, 161 Mass. 96.

We see no ground upon which the trust company is entitled to the possession of these mortgages. It is not the holder of notes which they were given to secure. It saw fit to make an agreement with the investment company, which enabled the latter to perform a fraudulent act. The petitioner is a holder for value, in good faith, of the notes, and is entitled to have the mortgages now held by the receiver transferred to him.

Decree affirmed.

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CHARLES D. DAVIS & others *vs.* CLARENCE A. BUNKER, assignee.

Middlesex. December 10, 1896. — February 27, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Insolvent Debtor — Power of Court to order Officers of Corporation to submit to Examination.

It is within the power of the Court of Insolvency, in the exercise of its discretion, to order the officers of an insolvent corporation to submit to an examination at any time.

PETITION, under Pub. Sts. c. 157, § 15, alleging that the Tuxedo Manufacturing Company, a corporation duly organized under the laws of the Commonwealth, filed a petition in the Court of Insolvency for the county of Middlesex on May 11, 1895, and a warrant in insolvency duly issued; that the petitioners were officers of the corporation at the time the petition in insolvency was filed; that the first meeting of the creditors of the corporation was held on May 23, 1895, at which time the respondent was duly appointed assignee; that the second meeting of the creditors was held on July 25, 1895, and the third meeting on November 14, 1895; that the third meeting was adjourned to December 12, 1895, and again adjourned to April 9, 1896; that at the adjourned meeting on April 9, 1896, the respondent requested the court to authorize him to examine the petitioners, and asked to have the meeting of the creditors adjourned to a future date for that purpose; that thereupon the court adjourned the meeting to May 14, 1896, and later on the same day the respondent filed in the Court of Insolvency a petition, praying that the present petitioners might be required "to attend and submit to an examination under oath before the court by your petitioner touching the trade and dealings, property and debts of said insolvent corporation, and all other matters which may affect the settlement of the estate of said insolvent corporation in insolvency"; that thereupon a citation issued to the petitioners to appear on April 13, 1896, to submit to an examination, as prayed for by the respondent, who was ordered to file specifi

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cations on or before that day; that the respondent filed a written statement purporting to be such specifications; that the petitioners, in obedience to the citation and summons issued under the petition of the respondent, appeared specially by their attorneys and objected to the examination for certain reasons, and asked that the petition and the proceedings be dismissed, and that they should not be held to answer thereto or to submit to the examination; that the Court of Insolvency refused to dismiss the petition and the proceedings, and ordered the petitioners to submit to the examination; that the respondent had full knowledge of the affairs of the corporation at the time of the insolvency proceedings, and at all times subsequent thereto; that he had from the beginning of the insolvency proceedings possession of all books, vouchers, and other papers, showing fully the condition of the corporation, and all its affairs and dealings; that from the date of the insolvency proceedings to April 9, 1896, the respondent made no application for the examination of the petitioners, but on the contrary expressly disclaimed any intention of examining them; and that, at the adjourned meeting on December 12, 1895, the respondent strongly opposed a further adjournment of the case, for the reason that it was for the interests of all persons interested in the estate to have the case closed.

The prayer of the petition was that this court would stay all further action on the petition of the respondent; that it would vacate the order of the Court of Insolvency, commanding the petitioners to appear and submit to an examination; and that it would order the petition of the respondent to be dismissed.

The answer alleged that the respondent, since the beginning of the insolvency proceedings, had not previously asked for an examination of the petitioners, because at all times since the second meeting in insolvency one or more creditors had been anxious to conduct the examination on their own behalf, and at their own expense, the results of which examination would have inured to the benefit of all the creditors; that an examination was set for November 22, 1895, at which, by advice of counsel, the petitioners did not appear, and by request of such counsel the examination was continued until the next day; that it was subsequently continued at their request, at intervals of one or two weeks, to December 21, 1895, upon which day a formal

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opening was made in the examination; that at the request of the petitioners' counsel the examination was further continued until January 25, 1896, when it appeared that the creditor in whose name the examination had been begun no longer desired to continue it, and although counsel for another creditor was present and anxious to go on with the examination, counsel for the petitioners declined to proceed further; that on February 10, 1896, a petition was filed by the Globe Newspaper Company upon which a citation issued returnable on February 17, on which date the examination was further continued until February 24, and then, at the request of that creditor, was dropped; that on March 10 a petition for an examination was filed by another creditor, upon which a citation was issued returnable on March 16, upon which date counsel for the petitioners appeared and objected to the examination, and a hearing was set for April 1 or 14, the first dates upon which a hearing could be had; that on March 17 another petition was filed by another creditor asking for an examination, and at a hearing upon the petition on March 19 the whole matter was continued until the regular adjourned third meeting upon April 9, on which day the respondent, in order to prevent further delays, filed his petition for examination as stated therein. Hearing upon the petition and answer, before *Allen*, J., who dismissed the petition, and, the petitioners having appealed, reported the case for the consideration of the full court.

E. R. Champlin, for the petitioners.

G. Cunningham, for the respondent.

MORTON, J. The question in this case relates to the power of a court of insolvency to examine the officers of an insolvent corporation. The Tuxedo Manufacturing Company, of which the petitioners were officers, was duly adjudged insolvent on May 11, 1895, and on the 23d of that month the respondent was duly appointed assignee. Afterwards various creditors from time to time filed petitions to examine the officers, the last being filed on March 17, 1896, and then continued to April 9. The parties filing these petitions were led successively to abandon them for reasons which do not appear, and on April 9, 1896, the respondent filed the petition to which this appeal relates, and the petitioners after due hearing were ordered to submit to examination.

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The third meeting was held on November 14, 1895, and adjourned to December 12, and thence to April 9.

The provisions relating to the examination of the officers of insolvent corporations are to be found in Pub. Sts. c. 157, § 130, and are as follows: "All the provisions of this chapter which apply to the debtor, or set forth his duties in regard to executing papers, submitting to examinations, . . . shall in like manner and with like force, effect, and penalties, apply to each and every officer of the corporation in relation to the same matters concerning the corporation and the money and property thereof." The provisions relating to the examination of debtors are to be found in § 70 of the same chapter, and are these: "The debtor shall, when required by the court at any time before the granting of his certificate, upon reasonable notice, attend and submit to an examination on oath before the judge, by the assignee or by any creditor, touching his trade and dealings, his property and debts, and all matters which may affect the settlement of his estate in insolvency." It is evident that these provisions cannot apply literally to officers of corporations, for it is expressly provided that discharges shall not be granted to them. Pub. Sts. c. 157, § 135. The petitioners contend, however, that the intention is that the examination of officers of corporations shall be limited in the same manner as that of debtors, which, generally speaking, will take place, if at all, at or before the third meeting, though if a discharge shall not then have been granted it may take place later. *Kimball* v. *Morris*, 2 Met. 573. Otherwise, they say, there would be no limit to the time when officers of corporations could be examined. But we think, in view of the fact that it is provided that discharges shall not be granted to corporations or their officers, that the reason for limiting their examination as that of debtors is limited fails, and that the more natural construction is that they may be examined at any time, in the exercise of a sound discretion on the part of the court, which in the present case we see no reason to doubt was properly exercised. The United States Bankrupt Law provides that "the court may . . . at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination." U. S. Rev. Sts. § 5086. But it has been held that the generality of this clause is controlled by a subsequent

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clause that "the bankrupt shall at all times, until his discharge, be subject to the order of the court," (§ 5104,) and that the bankrupt is not liable to examination after his discharge. *In re Dole*, 11 Blatch. 499; *S. C.* 9 Nat. Bankr. Reg. 193. *In re Jones*, 6 Nat. Bankr. Reg. 386. *In re Witkowski*, 10 Nat. Bankr. Reg. 209. Bump on Bankruptcy, (10th ed.) 653. As thus construed, the bankrupt law does not differ materially from our insolvent law in respect to its provisions for the examination of debtors. But though the provisions of the bankrupt law in regard to the examination and discharge of officers of bankrupt corporations are like those of our insolvent law (U. S. Rev. Sts. § 5122), we have been referred to no case, and have found none, in which a construction such as the petitioners contend for here has been given to the bankrupt law; and the reasons given for refusing a discharge to corporations under the bankrupt law, which would apply equally under the insolvent law, would seem to exclude such a construction. *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.* 91 U. S. 656.

We think, therefore, that the order dismissing the petition should be affirmed. *So ordered.*

FULTON NATIONAL BANK *vs.* DANIEL P. GOSLINE.

Suffolk. January 20, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Promissory Note — Action — Finding.

If a promissory note is discounted by a bank for the payee before maturity without any knowledge that the maker of the note has any defence to it as against the payee, to whose credit in his account with the bank the proceeds are passed, in an action on the note by the bank against the maker, evidence that the payee "ceased to be a depositor" in the bank on a date before the maturity of the note will justify the inference that at that time he closed his account with the bank, and a finding for the plaintiff is warranted.

CONTRACT, upon a promissory note for $335.66, dated August 8, 1894, payable in four months after date to the order of D. H. Kulp, signed by the defendant, and indorsed by Kulp to the

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plaintiff. The answer, among other defences, alleged that the note was signed and delivered to Kulp for his accommodation, and with the understanding that, if certain goods held by the defendant should be returned to Kulp, the latter would renew or pay the note when due; that the goods were returned by the defendant to Kulp before the note became due; that, if Kulp indorsed and delivered the note to the plaintiff, it was done after maturity, and if indorsed before maturity it was so indorsed and delivered without consideration; and that the note was fraudulently put into circulation by Kulp, and the plaintiff did not take it without notice of the fraud.

Trial in the Superior Court, without a jury, before *Richardson*, J., who allowed a bill of exceptions, in substance as follows.

John C. Carter, a witness called by the plaintiff, testified that he was the cashier of the plaintiff bank; that the note in suit was indorsed by Kulp in his presence, and was then delivered to the bank, through the witness, for discount, and was discounted; that the proceeds were passed to the credit of Kulp in his account with the bank; that he did not know anything of the relations between the defendant and Kulp other than what was shown by the note; that Kulp had been a depositor in the plaintiff bank for over seven years, and had had other notes discounted there; that the note in suit was discounted on August 10, 1894; that Kulp ceased to be a depositor in the plaintiff bank in the early part of October, 1894; and that he became financially embarrassed, and confessed judgment on October 6, 1894.

The defendant testified that he was doing business in Boston, and had dealings with Kulp, which began in 1893, under a contract between them; that he bought of Kulp a particular kind of goods which the latter manufactured; and that the note in suit was given in accordance with a contract which he had made with Kulp in 1894. His examination was continued as follows:

"*Q.* State what this particular note was, why it was given, and what it was for? *A.* It was given in consideration of goods shipped me and goods we had disposed of, etc., an account which was being — . . .

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"*Q.* That note, was it given for goods? *A.* It was. The goods were on our premises, and a certain amount remained there.

"*Q.* For what purpose was that note given? *A.* Simply because he asked for an accommodation note amounting to about that much.

"*Q.* What was the understanding between you on the giving of this particular note? *A.* That it should be renewed or paid as the goods were sold.

"*Q.* Were those goods sold? *A.* There were goods sold; yes, sir.

"*Q.* The goods for which this $335 note was given? *A.* I cannot say whether they were or not. That is to say, I don't know the condition of the account.

"*Q.* Were any of them subsequently returned? *A.* Certainly, there was a lot of goods returned.

"*Q.* Have you any account of the goods returned? *A.* We have a credit from them on the goods returned.

"*Q.* All I want to get at is to state for what purpose it was given? *A.* It was given as an accommodation note.

"*Q.* What was to be done by him when that became due, or what was to be done by him before it became due? *A.* It was supposed to be used as the contract stated. . . .

"*Q.* Now under what conditions were goods sent to you, and how were they paid for, if at all? *A.* Under the conditions of these contracts. The contracts were adhered to in every particular until this note became due, other notes being given, and Mr. Kulp paying part of them, or some portion of them, until this came due, and I have his letter where he agreed to pay this note. . . .

"*Q.* Had you given other accommodation notes? *A.* Four or five others.

"*Q.* Whether or not these notes were renewed? *A.* They were in whole or in part. . . .

"*Q.* Now, if you will answer my question, which I will put again, while I am getting at some of these letters, — if you will answer for what purpose this note was given? *A.* It was given at the request of Mr. Kulp for his accommodation.

"*Q.* Was there anything with reference to any goods to be

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returned by you, and if so, what was the result to be? *A.* There was a certain number of goods on hand at the place, and the arrangement was that they would be finally accounted for.

"*Q.* Did you return them? *A.* We did.

"*Q.* When did you return the goods? *A.* Some time in the latter part of August, 1894, I think. . . .

"*Q.* Now, if these goods were returned after the giving of that note, what was to be the result, so far as that note was concerned, which was given in August, 1894? *A.* Mr. Kulp was to take up the note on receipt of the goods, or when it became due. . . .

"*Q.* Did he ever take up this note? *A.* He did not.

"*Q.* The amount of goods which were returned shows on your account? *A.* It does.

"*Q.* Whether or not you were to pay anything at all upon that note provided the goods were returned? *A.* The difference between the note and the amount of goods was to be settled by whichever side the balance showed.

"*Q.* Can you say whether there was a balance in your favor or a balance in his favor, so far as that note is concerned, after the goods were returned? *A.* By my recollection of it, it is about an even sum, somewhere about an even sum of money.

"*Q.* It shows on your books? *A.* Yes, sir."

John C. Carter, recalled, testified that at the time that he received this note, or at any other time, he did not know anything about any agreements between Kulp and the defendant; and that the note was taken in the ordinary course of business.

The defendant "orally asked the court to find that the note was fraudulently put in circulation by Kulp, the plaintiff being bound to prove by a preponderance of the evidence that it obtained it in good faith and without notice of Kulp's fraud; that the plaintiff has not sustained the burden on the evidence; that even if the plaintiff bank obtained the note in good faith, and merely discounted it for the indorser and credited it on his account, it did not thereby pay for it, or part with anything, and therefore the plaintiff bank cannot recover on this evidence."

This the judge declined to do, and found for the plaintiff; and the defendant alleged exceptions.

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W. J. Miller, for the defendant.

J. M. Lesser & E. A. McLaughlin, for the plaintiff.

FIELD, C. J. We think that it was competent for the court to find, from the evidence, that the plaintiff took the note before maturity for value, without notice or knowledge of any fraud on the part of the payee in discounting it, or of any defence which the maker of the note had against the payee. Besides, from the inconsistent character of the different parts of the defendant's testimony, the court might well have found that the note was given for a valuable consideration, and that there had been no failure of consideration. Although there was evidence that the note was discounted for the payee by the plaintiff before maturity without any knowledge that the maker of the note had any defence to it as against the payee, and although the proceeds were passed to the credit of the payee in his account, yet the defendant contends that there was no evidence that these proceeds ever had been drawn out by the payee. Whether merely discounting the note for Kulp, and crediting the proceeds in his account, are sufficient to constitute the bank a purchaser for value, we need not decide. The note is dated August 8, 1894, and was payable four months after date, and was discounted by the bank on August 10, 1894. The cashier testified that the payee of the note "ceased to be a depositor" in the bank in the early part of October, 1894. From this testimony the court could infer that at that time the payee closed his account with the bank.

Exceptions overruled.

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JOHAN G. DE BANG *vs.* EDGAR G. SCRIPTURE.

Suffolk. January 20, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Notice of Filing of Exceptions.

If no notice of the filing of exceptions is given to the adverse party within twenty days after the verdict in the case, the exceptions will be discharged.

CONTRACT, on an account annexed. Trial in the Superior Court, before *Sheldon*, J., who directed a verdict for the plaintiff; and the defendant alleged exceptions, to the allowance of which the plaintiff objected for the reason set forth in the opinion.

J. C. Sharkey, for the defendant.

F. N. Nay, for the plaintiff.

FIELD, C. J. The presiding justice of the Superior Court makes the following statement at the end of the bill of exceptions: "The statements in this bill of exceptions are correct, and I allow these exceptions, if on the following facts I have power so to do. The case was tried before me and a verdict rendered for the plaintiff on the fifth day of June, A. D. 1896. There was no extension of the time for filing exceptions. The defendant filed his bill of exceptions on the twenty-fifth day of said June, but gave no notice thereof to the plaintiff until the twenty-sixth day of June; and the plaintiff for this reason objected and objects to the allowance of the exceptions."

The exceptions must be discharged, because no notice of the filing of the exceptions was given to the adverse party within twenty days after the verdict in the case. *Baron* v. *Fitzpatrick*, 167 Mass. 417.

Exceptions discharged.

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FRANKLIN A. PACKARD & others *vs.* OLD COLONY RAILROAD COMPANY.

Plymouth. January 20, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Deed — Trust — Cemetery Corporation — Legality of Organization — Presumption — Lapse — Title — Dissolution — Land Damages — Parties — Evidence.

A deed of land recited that, in consideration of a certain sum paid by three persons named, "a committee of and in behalf of" a certain cemetery corporation, the grantor conveyed to such persons, "for the use and behoof of said corporation" the land to be held "in behalf of the said corporation, to their use and behoof forever"; and that the land was free from encumbrances, "except that the ground shall never be used for other purposes than as a cemetery." *Held*, that the deed was to be construed as a deed in trust for the corporation, and conveyed a fee, though no words of limitation to heirs were used.

No particular words are required to create a trust; and the absence of the words "in trust" or "trustees" does not negative a trust.

The St. 1841, c. 114, provided that any ten or more persons might organize as a corporation for the purpose of establishing a cemetery, in the same manner that religious societies were authorized to organize under Rev. Sts. c. 20. By the latter statute religious societies containing ten or more qualified voters might organize as a corporation in the manner specified. *Held*, that, in the absence of a provision requiring the presence of any particular number of persons at the first meeting, the fact that eleven persons signed the application for a meeting to organize a cemetery corporation, although they did not all attend the first meeting, would warrant the assumption that the corporation was legally organized.

The presumption of regularity extends to the proceedings in the organization of a corporation.

If a corporation to which land was conveyed has lapsed, mere possession in the heirs of the grantor is not sufficient to show title in them.

Where land is conveyed in trust for a cemetery corporation, whose records show that deeds of many burial lots were given for several years, and interments were made, and the land had not ceased to be used as a cemetery, the corporation is not dissolved by the omission to choose officers and to hold meetings; nor will the title to the land revert to the original grantor without due proceedings had for that purpose.

If land is conveyed in trust for a cemetery corporation, the trustees are the proper parties to bring a petition for a jury to assess the damages caused by a railroad corporation taking a portion of the land.

Ancient books, purporting to be the records of a cemetery corporation, produced from the custody of the last secretary of the corporation, are competent evidence upon the trial of a petition for an assessment of damages caused by the taking of land conveyed in trust for the corporation by the heirs of the grantor claiming title thereto.

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PETITION to the Superior Court, by Franklin A. Packard, Lilian F. Packard, and Frances B. Packard, for a jury to assess the damages caused by the taking by the respondent of the petitioners' land in Brockton, and also the damages alleged to have been caused by such taking to the petitioners' adjoining land. Trial in the Superior Court, before *Braley*, J., who reported the case for the determination of this court, in substance as follows.

It appeared that the land taken, together with the land adjoining it, was owned in fee by Charles Packard prior to December 20, 1848, and formed a part of his cultivated farm; that Charles Packard died in 1851, and left his son, Charles T. Packard, as his sole surviving heir; and that Charles T. Packard died in 1874, and left as sole surviving heirs his children, Franklin A. Packard and Lilian F. Packard, and his widow, Frances B. Packard, the present petitioners.

On December 20, 1848, Charles Packard executed a deed of the land in question, which recited that, "in consideration of two hundred and twenty dollars, paid by Sidney Perkins, Hiram Atherton, and L. F. Charles Loomis, . . . a committee of and in behalf of Village Cemetery, a corporation," the grantor conveyed "to the said Perkins, Atherton, and Loomis, for the use and behoof of said corporation, a lot of land . . . containing seven acres more or less, in which two acres lying in the northwesterly part are the free and unqualified gift of the said Charles Packard"; that the granted premises were to be held "in behalf of the said corporation, to their use and behoof forever"; that they were free from all encumbrances, "except that the ground shall never be used for other purposes than as a cemetery"; and that the grantor would warrant and defend the same to the grantees "in behalf of the said corporation."

The petitioner Franklin A. Packard testified, in substance, that his father, Charles T. Packard, went upon the premises at various times between 1863 and 1867, fixed the fence, broke off twigs, tossed off stones "and such things as that to make the land more presentable"; that the witness went upon the land in 1879, 1880, and 1883, claiming it as his "mentally" and believing that he owned it, and cleared away any obstructions there, such as broken bottles and glass, and fixed up the fences;

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that all this time the land had been used as a cemetery; that he knew of the "Village Cemetery"; and that, in 1883, under the advice of counsel, he notified the "Village Cemetery" that he claimed the land as his own.

The respondent, against the objection and subject to the exception of the petitioners, introduced in evidence the record book and the account book of the "Village Cemetery."

The petitioners objected to these books as incompetent and immaterial, but admitted that they were the books of the association claiming to be incorporated under the name of the "Village Cemetery."

From the record book it appeared that on February 5, 1848, eleven men desirous of organizing themselves as a corporation to procure a cemetery under the act of March 17, 1841, signed a petition to a justice of the peace to issue a warrant to one of them to call a meeting of the subscribers on February 16, to adopt by-laws and such other measures as might be necessary to accomplish the proposed object of procuring a cemetery; that the justice issued his warrant to this effect to Edward S. Packard, who made his return thereon February 9; and that on February 16 a meeting was held, at which a secretary, president, and treasurer were chosen, and a committee appointed to draft a constitution and by-laws; but there was no record of the number present. Subsequently, and at varying intervals up to April 20, 1854, sixteen meetings were held, at one of which, on October 31, 1848, the name was chosen of "Village Cemetery."

On February 20, 1883, a justice of the peace directed Amasa Edson "to notify and warn all the proprietors of 'Village Cemetery,' so called, to meet" on March 8, at a place named, "for the purpose of forming themselves into a corporation, then and there to act on the following articles, to wit: 1st. To choose a secretary. 2d. To choose all other necessary officers for said corporation. 3d. To adopt by-laws for said corporation. 4th. To prescribe the method of calling future meetings"; and Edson made due return of the warrant on March 7, 1883.

A meeting was held on March 8, 1883, and, a communication of the Packard heirs being read, the president was authorized to obtain counsel. On March 22, 1883, another meeting was held,

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and, after a discussion as to the title to the premises, H. A. Ford was authorized to take legal advice, and a request was sent to the register of deeds to send a copy of the deed of the land. The next meeting was on April 27, 1883, when authority was given Ford to take further legal advice. The next meeting was on May 25, 1883, when the legality of the original corporation was called into question on the ground of the number of members present at the first meeting, and the secretary was authorized to take legal counsel. The next meeting was on June 29, 1883, when a report was read that, after the advice of counsel being taken, there was a possibility that an insufficient number was present at the first meeting. The next meeting was held on August 7, 1883, when it was suggested that the Legislature be petitioned to re-establish the corporation. Another meeting was held on November 6, 1883, but nothing was done. The last meeting was held on December 18, 1883, when nothing was done, except to vote an adjournment to the first Tuesday in September, 1884.

The records also showed that deeds of twenty-nine burial lots were given from 1849 to 1854. Thaddeus E. Gifford, a witness called by the respondent, testified that he had known of this land being used as a cemetery for over forty years, and gave the names of various persons, including Charles Packard, who he knew had been buried there; and that he obtained the books of the "Village Cemetery" from the widow of Henry M. Littlefield, the last secretary of the corporation.

The judge ruled that the petitioners had not shown any right or title in the land, the taking of which would entitle them to recover any damages.

If, upon the evidence reported, the petitioners have any right or title in the land upon which they are entitled to have damages assessed, the cause was to be remanded for such assessment; otherwise, the petition was to be dismissed.

H. N. Shepard, for the petitioners.

J. H. Benton, Jr., for the respondent, submitted the case on a brief.

ALLEN, J. The petitioners contend that the deed by their ancestor was governed by the statute of uses, and that there was no legally existing cemetery corporation, and therefore the

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deed was ineffectual for want of an existing *cestui que use*; or, if otherwise, that at any rate it conveyed no more than a life estate, leaving a reversion in the grantor's heirs.

The deed on its face shows a clear intention that the estate granted should not be limited to the lives of the three persons named as grantees. The purpose was that the land granted should be used for burial purposes by the corporation called the "Village Cemetery." Though the word "heirs" is not found in the habendum, it is recited that the granted premises are to be held, "in behalf of the said corporation, to their use and behoof forever." In the covenant against encumbrances, a provision is inserted, "except that the ground shall never be used for other purposes than as a cemetery." In the granting part of the deed it is also stated that two acres are the free and unqualified gift of the grantor.

It is well settled that deeds are to be so construed as to give effect to them according to the intention of the parties where that is possible; and a conveyance may always be construed to be of that kind or species which may be necessary in order to vest the title according to that intention, if such interpretation is not repugnant to the terms of the grant. *Jamaica Pond Aqueduct* v. *Chandler*, 9 Allen, 159, 167. *Chenery* v. *Stevens*, 97 Mass. 77, 86. *Carr* v. *Richardson*, 157 Mass. 576. *Leonard* v. *Southworth*, 164 Mass. 52. Crocker's Notes on Common Forms, 2. It being plain that this deed was intended to be for the benefit and use of the Village Cemetery corporation, it is to be construed as a deed in trust for that corporation. No particular words are required to create a trust. The absence of the words "in trust," or "trustees," does not negative a trust. 2 Washb. Real Prop. (5th ed.) 547. Lewin on Trusts, (7th ed.) 98, 118. And as the purposes of the trust require a legal estate in the trustees for a period beyond their own lives, they will take a fee though no words of limitation to heirs were used. *Cleveland* v. *Hallett*, 6 Cush. 403. *Easterbrooks* v. *Tillinghast*, 5 Gray, 17. *Packard* v. *Marshall*, 138 Mass. 301. *Stanley* v. *Colt*, 5 Wall. 119, 168. 2 Washb. Real Prop. (5th ed.) 537.

The petitioners, however, contend that the Village Cemetery was never legally organized as a corporation, and that therefore the deed was ineffectual to convey any title. There

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can, however, be no doubt that the Village Cemetery was a corporation *de facto*, and as the petitioners' grantor acted on the assumption that it was a corporation, and so described it, and received money which probably came from its funds as the consideration of the deed, it is at least doubtful if it is now open to the petitioners to deny the due and legal organization of the Village Cemetery as a corporation. But it is not necessary to rest upon this ground, as there is sufficient evidence that it was legally organized.

The chief objection to the regularity of its organization rests on the ground that the records do not show in express terms that ten persons were present at the first meeting. By St. 1841, c. 114, § 1, under which the action was had, "Any ten or more persons may organize as a corporation for the purpose of procuring, establishing, and preparing a cemetery or burial place for the dead, in the same manner that religious societies are authorized to organize by the provisions of the twentieth chapter of the Revised Statutes." Section 2 provides that, "when such persons are organized as aforesaid, they shall become a corporation," etc. Referring now to the Revised Statutes, c. 20, we find the following provisions:

"Sect. 26. Any parish, which, from the want of officers, or any other cause, may be unable to assemble in the usual manner, and any religious society that is not incorporated, provided they contain respectively ten or more qualified voters, may organize themselves as a corporation, in the manner and for the purposes expressed in the following sections.

"Sect. 27. Any justice of the peace for the county in which such parish or religious society may be, upon application in writing by any five or more of the qualified voters thereof, may issue his warrant for calling a meeting of the same.

"Sect. 28. The warrant shall state the objects of the meeting, and shall be directed to some one of the applicants therefor, requiring him to warn the qualified voters of the parish or society to meet at such time and place as shall be appointed in the warrant; and upon due return thereof the same justice, or any other justice of the peace for the county, may preside at such meeting, for the choice and qualification of a clerk, who shall enter at large upon the records of the parish or society the pro-

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ceedings had in the organization thereof; and the parish or society may thereupon proceed to choose a moderator, and to do all such other things as parishes are by law authorized to do at their annual meetings. . . .

"Sect. 29. Every parish and religious society, organized as provided in the three preceding sections, shall become a corporation."

It will be seen that there is no provision in the statutes requiring the presence of any particular number of persons at the first meeting. Eleven persons signed the application, and thus expressed their wish and intention to be members of the corporation. This was a proceeding analogous to the signing of the articles of agreement, which was deemed essential in the case mostly relied on by the petitioners. *Utley* v. *Union Tool Co.* 11 Gray, 139. Having done this, it was not necessary that all should attend the first meeting.

Moreover, even if it were necessary for ten to be present, there would be a presumption that this requirement had been complied with. The presumption of regularity extends to the proceedings in the organization of corporations. In *Narragansett Bank* v. *Atlantic Silk Co.* 3 Met. 282, 287, it was said: "The maxim of law is, that all things shall be presumed to have been rightly and correctly done, until the contrary is proved. This maxim is stated and explained, and many instances given of its application to corporations, and to acts and doings of their members, officers, and agents, in *Bank of United States* v. *Dandridge*, 12 Wheat. 64, 70. As the corporation could not proceed lawfully until duly organized, and as they did proceed to act as a corporation, this presumption has its effect." This doctrine is often applied, and it is to be assumed that ten persons were present at the first meeting, if that number was necessary. *Wallace* v. *First Parish in Townsend*, 109 Mass. 263. *Platt* v. *Grover*, 136 Mass. 115. *Commonwealth* v. *Carr*, 143 Mass. 84. *Commonwealth* v. *Woelper*, 3 S. & R. 29. *Grays* v. *Lynchburg & Salem Turnpike Co.* 4 Rand. 578. *Lauderdale Peerage*, 10 App. Cas. 692.

The petitioners also contend that, if any title passed by the deed, the corporation has lapsed, and upon such lapse mere possession in the petitioners is sufficient, — meaning, we suppose,

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sufficient to show title in them. No authority is cited in support of this proposition, and we are aware of none which supports it. The case does not fall within the doctrine that when the purposes of a trust have failed, or have been completely performed, the trustees then hold the estate for the benefit of the heirs at law, as a resulting trust, and are answerable to them for it upon proper proceedings. *Packard* v. *Marshall*, 138 Mass. 301. *Easterbrooks* v. *Tillinghast*, 5 Gray, 17. The purposes of this trust have not failed, and have not been completely performed. The records show that deeds of twenty-nine burial lots were given from 1849 to 1854, interments were made, and the land had not ceased to be used as a cemetery. The corporation was not dissolved by the omission to choose officers, and to hold meetings; nor would the title to the land revest in the original grantor, without some due proceedings had for that purpose. *Boston Glass Manufactory* v. *Langdon*, 24 Pick. 49. *Heard* v. *Talbot*, 7 Gray, 113, 119. *Briggs* v. *Cape Cod Ship Canal Co.* 137 Mass. 71. The trustees were the proper parties to bring this petition. *Davis* v. *Charles River Branch Railroad*, 11 Cush. 506. *Howe* v. *Ray*, 110 Mass. 298.

The records of the corporation were competent evidence. *King* v. *Little*, 1 Cush. 436. This indeed is not now controverted.

In the recent case of *Hopkins* v. *Grimshaw*, 165 U. S. 342, which bears a resemblance to the present case in some of its aspects, a resulting trust in favor of the grantor and his heirs was declared to exist. But in that case the society which for a time maintained the burial ground was not incorporated, and it was practically dissolved and extinct, and the land had ceased to be used for burial purposes, the bodies all having been exhumed and removed to other cemeteries.

Petition dismissed.

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FRANCENA A. HILL *vs.* JOHN W. McKIM, Judge of Insolvency.

Suffolk. January 21, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Insolvent Debtor — Statute — Prohibition — Remedy — Mandamus — Composition Proceedings.

The proper remedy in case of the refusal of a judge of insolvency to order a hearing on a proposal of a composition made by an insolvent debtor is by a bill or petition under Pub. Sts. c. 157, § 15, and not by mandamus.

It seems, that a judge of insolvency will not be compelled against his judgment to order a hearing on a proposal for composition so trifling in amount as under no circumstances "to be consistent with justice and for the interests of the creditors," within the meaning of St. 1884, c. 236, § 9.

PETITION, by an insolvent debtor, for a writ of mandamus, requiring the judge of the Court of Insolvency to order a hearing on a proposal for a composition. At the hearing, before *Allen*, J., two questions were presented. 1. Whether it was the duty of the judge of insolvency to order a hearing on the proposal for composition, or whether he might in his discretion decline so to do, in view of the smallness of the offer. 2. Whether the remedy was by a petition for a writ of mandamus, or under Pub. Sts. c. 157, § 15. The judge reserved the questions for the consideration of the full court. The facts appear in the opinion.

J. W. Pickering, for the petitioner.

E. George, for the respondent.

FIELD, C. J. We are of opinion that the proper remedy in cases of this kind is by a bill or petition under Pub. Sts. c. 157, § 15, and not by mandamus. *Van Ingen* v. *Beal*, 165 Mass. 582. *Jaquith* v. *Fuller*, 167 Mass. 123. *Fairweather* v. *McKim*, *post*, 103. The petition, therefore, must be dismissed.

We may as well say that we think that the judge of insolvency should not be compelled against his judgment to order a hearing on an offer so trifling in amount as the offer in this case. It appears by the schedule of creditors that the number of creditors is twenty-two, and that the total indebtedness is $4,096.89. Computing the offer of one tenth of one per cent on the total in-

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debtedness, the amount of money to be paid into court to carry out the composition is four dollars nine and six tenths cents. This amount, disregarding fractions below one tenth of a cent, would be payable to the several creditors in sums as follows: Six cents; one cent and five tenths; two cents and four tenths; three cents and one tenth; five cents and nine tenths; seven tenths of one cent; ten cents; one dollar and forty-three cents and three tenths; six cents; seventeen cents and two tenths; twelve cents and five tenths; twenty cents and six tenths; nineteen cents; twenty-five cents; seventeen cents; six cents and six tenths; twenty cents; forty-two cents and five tenths; seventeen cents and one tenth; twenty-eight cents; four cents and nine tenths.

It is true that St. 1884, c. 236, § 3, provides that the court, upon the filing of the proposal for composition, "shall order a hearing on such proposal as early as may be, of which the register shall send notice by mail postpaid to all known creditors," etc. But § 9 of the same statute provides as follows: "If the composition appears to have been duly assented to, and to be consistent with justice and for the interests of the creditors, the court shall order the same to be confirmed," etc. It is not worth while for the court of insolvency to order a hearing on a proposal for composition which the court under no circumstances would find "to be consistent with justice and for the interests of the creditors." The statutes relating to insolvency undoubtedly contemplate that an insolvent debtor, although he have no property, may obtain his discharge if his creditors to the requisite number and amount assent to it. The debtor in this case is not without remedy, if no hearing is ordered on her present offer. She can make a better offer, or proceed to take out a warrant, and have the estate administered under Pub. Sts. c. 157.

Petition dismissed.

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LEMUEL E. DEMELMAN *vs.* CHARLES L. HUNT & another.

Suffolk. January 21, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Poor Debtor — Breach of Recognizance — Discharge in Insolvency — Bar to Action — Principal and Surety.

A poor debtor, who has entered into a recognizance to deliver himself up for examination, is not excused from appearing at the time fixed for the examination by the fact that he had begun proceedings in insolvency earlier on that day.

A discharge in insolvency of the principal in a poor debtor's recognizance is a bar to an action thereon against him for a breach occurring before the discharge, but, under Pub. Sts. c. 157, § 85, does not release a surety on the recognizance.

CONTRACT, upon a poor debtor's recognizance, entered into by the first named defendant as principal, and by William I. Holmes, the other defendant, as surety. Trial in the Superior Court, without a jury, before *Richardson*, J., who found for the principal defendant, and for the plaintiff against the defendant surety; and the latter alleged exceptions. The facts appear in the opinion.

J. L. Hunt, for the defendant surety.

W. N. Buffum, for the plaintiff.

HOLMES, J. This is an action upon a recognizance given in poor debtor proceedings, conditioned for the debtor's delivering himself up for examination within thirty days. St. 1888, c. 419, § 6. The recognizance is dated April 20, 1895. As we understand the defective bill of exceptions, the debtor submitted himself for examination and made default on May 17, at half past ten in the morning. Earlier on that day he had begun proceedings in insolvency, and on December 26, 1895, he was discharged from all debts due on May 18. The judge before whom this case was tried found for the principal defendant, the debtor, but found against the surety in favor of the plaintiff. The surety excepted.

It is difficult to extract from the bill of exceptions what questions are raised by it. One point seems to be that the debtor was excused from appearing for examination by the fact that he had begun insolvency proceedings an hour before, although

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of course the result of the proceedings was uncertain, and that therefore there was no breach. This is not the law. *Everett* v. *Henderson*, 150 Mass. 411, 415. *Smith* v. *Randall*, 1 Allen, 456. The language of *Everett* v. *Henderson*, relied on by the defendant, applied only to a case where a discharge in insolvency has been granted before the time fixed for the examination.

The other point is that the discharge in insolvency is a bar. If there had been no breach of the recognizance before May 18, it would not have been affected by the discharge, because it still had some time to run. *Smith* v. *Randall* and *Everett* v. *Henderson*, *ubi supra*. But it seems fair to assume that the default of May 17 was the breach relied on, and we assume that the debtor was discharged, as the defendant contends. But the surety was not discharged on that account. His liability is preserved by the statute in terms. Pub. Sts. c. 157, § 85. *Carpenter* v. *Turrell*, 100 Mass. 450, 453, has no application. That was a decision upon a bond given to dissolve an attachment upon which the discharge in bankruptcy had no direct operation as to any of the parties.

There is no question of pleading before us.

Exceptions overruled.

WELLINGTON B. FAIRWEATHER *vs.* JOHN W. McKIM, Judge of Insolvency, & another.

Suffolk. January 25, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Prohibition — Insolvent Debtor — Composition Statute — Equity — Parties.

A petition to restrain the judge and register of insolvency from further proceedings relating to a proposal for composition under St. 1884, c. 236, cannot be maintained as a petition for a writ of prohibition; and as a petition under Pub. Sts. c. 157, § 15, the insolvent debtor is a necessary party.

PETITION, by a creditor of William Bassett, for a writ of prohibition against both the judge and register of probate and insolvency to restrain them from further proceedings relating to a

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proposal for composition under St. 1884, c. 236. The respondents demurred. Hearing before *Allen*, J., who treated the petition as brought under Pub. Sts. c. 157, § 15, entered a decree remitting the matter to the court of insolvency for a hearing upon the petition, the restraining order to stand until after such hearing; and reported the case for the consideration of the full court.

C. S. Ward, for the petitioner.

J. C. Sharkey, for the respondents.

FIELD, C. J. If the petition in this case is to be considered as a petition for the common law writ of prohibition, we think it should be dismissed. The court of insolvency undoubtedly has jurisdiction over the petition in insolvency of William Bassett. The complaint is that the judge of that court is proceeding irregularly under that petition in confirming the proposal made by Bassett for a composition with his creditors. Any error in the proceedings cannot be corrected by a writ of prohibition. The proper process is by a bill or petition under Pub. Sts. c. 157, § 15. *Jaquith* v. *Fuller*, 167 Mass. 123. The justice before whom this case was tried treated the petition as brought under that statute, and therefore rightfully took jurisdiction of the case. If there is any doubt that the form of the petition is such that it cannot properly be considered as a petition under that statute, it can be amended before a single justice, as the case must be sent back for another reason. As a petition under section 15 of chapter 157 of the Public Statutes, William Bassett, the insolvent debtor, is interested in the question presented and should be made a party respondent. The order of the single justice remitting the case to the court of insolvency therefore is vacated that Bassett may be made a party, and that any other proper amendments may be made when the case can be again heard before a single justice.

So ordered.

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JAMES F. KIMBALL & another *vs.* EDWARD H. SWEET.

Suffolk. January 26, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Service of and Return upon Writ — Jurisdiction of Superior Court — Appeal from Order overruling Motion to Dismiss.

S. was described in a writ as "of P. in the county of P. and State of Rhode Island," the officer's return of service reciting that he had attached a chip as the property of S., and summoned him "by delivering in hand, by direction of plaintiff's attorney, to W., as the attorney of the said S., a summons of this writ." S. having appeared specially in the Superior Court, and moved to dismiss the action for want of proper service on him, the motion was overruled, and S. appealed. *Held*, that because the question was one of the jurisdiction of the court, and on the face of the writ and the return of service indorsed thereon the Superior Court acquired no jurisdiction over S., the appeal would lie, and that the action should be dismissed.

APPEAL, from the order of a judge of the Superior Court, overruling the defendant's motion to dismiss for want of proper service upon him. The facts appear in the opinion.

F. Hutchinson, (*W. H. Preble* with him,) for the defendant.

H. R. Bailey, (*W. R. Sears* with him,) for the plaintiffs.

FIELD, C. J. The defendant appeared specially in the Superior Court, and moved to dismiss the action "for want of proper service on the defendant." This motion was overruled, and the defendant appealed. See *Maley* v. *Moshier*, 160 Mass. 415. The defendant was afterwards defaulted. The defendant is described in the writ as "of Providence in the county of Providence and State of Rhode Island." The return of service by the officer is as follows. "Suffolk, ss. Boston, June 16th, 1896. By virtue of this writ I this day attached a chip as the property of the within named defendant, Edward H. Sweet, and summoned him to appear and answer at court as within directed by delivering in hand, by direction of plaintiff's attorney, to W. H. Preble, Esq., as the attorney of the said Sweet, a summons of this writ. Robert E. Maguire, Deputy Sheriff."

It seems that generally the decision of a justice of the Superior Court upon such a motion is final, and that there is no appeal to

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this court. Pub. Sts. c. 153, § 8. *Bassett* v. *Howorth*, 104 Mass. 224. *Parker* v. *Kenyon*, 112 Mass. 264. *Houghton* v. *Ware*, 113 Mass. 49. *Kennedy* v. *Langdon*, 123 Mass. 193. *Rutland County National Bank* v. *Johnson*, 155 Mass. 43. *Guild* v. *Bonnemort*, 156 Mass. 522. *Heavor* v. *Page*, 161 Mass. 109.

If W. H. Preble was not in fact the attorney of the defendant to receive service of process according to our statutes, and if judgment should be entered against the defendant, as the defendant is not an inhabitant of the Commonwealth he would have a remedy by writ of error, or, if suit were brought on the judgment, by plea and proof. See Pub. Sts. c. 161, § 31; c. 164, § 4; *Eliot* v. *McCormick*, 144 Mass. 10; *Needham* v. *Thayer*, 147 Mass. 536.

The question in the present case goes to the jurisdiction of the court over the defendant. The service of the writ does not purport to be on any person known to the officer to be the attorney of the defendant, as authorized by Pub. Sts. c. 161, § 31, or on any person who appears as the attorney of the defendant in any action brought by him against the present plaintiff, as authorized by Pub. Sts. c. 164, § 4. Without considering whether service in accordance with the provisions of either of these sections would be sufficient under the recent decisions of this court which are cited above, and which follow the decisions of the Supreme Court of the United States upon the effect of the fourteenth article of the Amendments of the Constitution of the United States, we are of opinion that the appeal lies, and that the action should be dismissed, because on the face of the writ and of the return of service indorsed on it the Superior Court acquired no jurisdiction over the defendant. See *Allin* v. *Connecticut River Lumber Co.* 150 Mass. 560; *Merrill* v. *Beckwith*, 163 Mass. 503.

So ordered.

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JAMES B. MAYNARD, executor, *vs.* JOHN TYLER & another.

Suffolk. January 29, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Will — Instructions — Exceptions.

The appellant from a decree allowing a will is not entitled to have the jury instructed that, if the testator's widow was his mistress to the time of the marriage, and the marriage was brought about for the purpose of unduly influencing him to make a will in her favor, or in accordance with her desire, they would be justified in finding that the will was obtained by undue influence, especially if the will was not beneficial to her; and an instruction, that "in the eye of the law her position at the time the will was made, in reference to the relation to her husband, was precisely the same as that of the most honored wife in the land," is not open to objection.

If a bill of exceptions alleged at the trial of an appeal from a decree allowing a will states that certain circumstantial evidence therein set forth, with other evidence of a similar kind, was the only evidence relied on to show that the testator's widow used undue influence upon him to induce the making of the will, no ground of exception is shown to the statement by the judge in his charge to the jury that there was no direct evidence upon that point.

No exception lies to the statement by the judge in his charge to the jury, that "the substance of the testimony" of a group of witnesses was of a certain character, if it is fairly stated.

A request for an instruction, at the trial of an appeal from a decree allowing a will, that if the jury should find that, at the time of making the will, the testator was acting under "any hallucination or delusion, or erroneous opinion amounting to delusion," that would be evidence that at that time he was not of sound mind, is properly qualified by the instruction that, "if a person is under an insane delusion in reference to the subject matter, or has an insane delusion concerning a fact which affects his duty and responsibility in preparing a will, if such an insane delusion is proved, that would affect what would otherwise be considered a good will."

APPEAL from a decree of the Probate Court, allowing two certain instruments as the last will and codicil of Benjamin F. Tyler.

The case was tried in this court, before *Knowlton*, J., upon the following issues: 1. Did Benjamin F. Tyler duly execute the instrument offered for probate as and for his last will? 2. Did he duly execute the instrument offered for probate as and for a codicil to his last will? 3. Was he at the time of the execution of the alleged will of sound mind? 4. Was he at the

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time of the execution of the alleged codicil of sound mind? 5. Was he unduly influenced in the making and execution of the alleged will by Annie Frances Tyler? 6. Was he unduly influenced in the making and execution of the alleged codicil by Annie Frances Tyler?

The judge allowed a bill of exceptions, in substance as follows.

There was no contest over the first and second issues.

The undisputed evidence showed that Benjamin F. Tyler died in that part of Boston known as Charlestown on February 10, 1895, from saccharine diabetes, at the age of seventy-two years. For many years prior to January 31, 1892, he had been a bookkeeper for Hittinger and Company and the Fresh Pond Ice Company. On that day his employment there ended, and afterwards he was engaged in no other business than to take care of his property, which consisted largely of real estate in the occupation of tenants.

He left a widow, whose maiden name was Annie F. Simonds, and three children, Marie L. Tyler, who was unmarried, Emeline B. Simonds, the wife of Calvin Simonds, and John Tyler. John was married, and at the time of his father's death had two sons; and Emeline had three daughters and one son. He left also a brother and sister, Jonas Tyler and Annie Tyler, who were both unmarried. His first wife, who was the mother of his children, died after a long illness on February 1, 1890, and he was marrried to Annie F. Simonds, who was a grandniece of his first wife, and was then only about twenty-nine or thirty years of age, on May 1, 1893. There was evidence tending to show that she had formerly been engaged to be married to his son, who died before the testator; that the engagement had been broken off; and that she was in the testator's family for a while as a nurse during the last illness of his first wife. The appellant, Marie L. Tyler, testified to some things indicating that there were then improper relations between them; and she further testified that, after her mother's death, Annie F. Simonds came to the testator's house, without invitation, on February 22, 1890, and that the witness saw her the next morning coming from the testator's room partly undressed, and told her to leave the house and never to return there. The evidence tended to show that she then went away, and did not return until Jan-

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uary 13, 1892; that in the mean time the testator was accustomed to spend part of his evenings at her rooms in East Cambridge; that during most of his life he had been in the daily habit of using intoxicating liquor, and he occasionally, although infrequently, drank to excess; that on January 12, 1892, he was at her rooms, either intoxicated or in a condition resembling intoxication, and almost uncontrollable; that a physician was called, who went with him and Annie F. Simonds to the Quincy House in Boston, whither his son John was summoned, and at a late hour of the night he was carried home by a ruse, and his family physician summoned; that on arriving at the house he was very violent, fighting with his son and daughter with a sword, and attempting to get his pistols; that from that time Annie F. Simonds remained at his house; and that she was sometimes an occupant of his room and his bed.

The appellant, Marie L. Tyler, who had for a long time been regularly employed by a business firm, lived at her father's house, and paid him three dollars per week for her board. For a few weeks during her mother's last illness she left her regular employment and nursed her mother, for which he afterwards made her a present of one hundred dollars. The evidence tended to show that she was greatly disturbed by the presence of Annie F. Simonds in her father's house, and that the other appellant, her brother, strongly objected to it. There was also evidence tending to show that the testator's relations with John and Marie had previously been friendly and affectionate. She testified that in March, 1892, her father notified her to vacate her room; that on her failing to do so, on September 8, 1892, her bed was taken down and put away; that on November 10, 1892, she received notice in writing from her father to leave the house; that on November 19 he told her he never wanted to see her face again, and on November 20 she went away; that she and he remained estranged during the remainder of his life; and that from about that time neither she nor her brother visited their father, or had any communication with him. He and his daughter Emeline maintained their friendly relations, and were accustomed to visit each other as long as he lived. John Tyler admitted, on cross-examination, that he sent his father an anonymous letter in the summer of 1892 in reference to his domestic

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relations; and there was evidence tending to show that there was strong feeling on the part of Emeline against her brother and sister in reference to their conduct towards their father.

Marie L. Tyler testified that, on one occasion while she lived at his house, after January, 1892, the testator said he thought his liquor was drugged; that on another occasion, soon after the death of his first wife, some medicine was put into his liquor with a view to administer it without his knowledge, and that he quickly discovered it, and refused to take it. There was also evidence that at another time he said that John and Marie were trying to put him into an insane asylum, and to get his property away from him.

His last marriage was by a justice of the peace, in the presence of only two witnesses, both of whom were former friends of Annie F. Simonds, who had not been acquainted with the testator until after she came to live at his house. He had for many years professed to be an atheist. The marriage was not publicly announced until about May 28, 1893. There was no testimony that Annie F. Simonds ever conversed with him on the subject of making a will, or that she knew of the making of the will or codicil, or of his intention to make either of them until after they were made, except that she was in the room with him and the others a few minutes while the codicil was being executed. The foregoing, and other evidence of a similar kind, was the only evidence relied on as tending to show that she used undue influence upon him to induce the making of either of the instruments.

A great many witnesses were called by the executor, who testified to having been acquainted with the testator for many years, and to having seen him from time to time from January, 1892, until about the time of his death, and who said in substance that they never noticed any change in his mode of speech, his manner, or in his conduct in any particular, that attracted their attention as indicating a change in his mental condition. The evidence tended to show that he was suffering for a long time from a very debilitating and painful disease; and there was testimony that he was less talkative and cheerful during the last part of his life than formerly, and that he showed the effects of weakness and bodily disease in his manner and con-

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versation; but there was no testimony of any incoherence in his speech, or of any violence, or of any peculiarities of conduct or manner other than what is above stated. The evidence tended to show that he managed his property and financial affairs, with the aid of persons acting under his direction, until a few days before his death. There was also evidence tending to show that his wife nursed him faithfully during his illness, and did what she could to minister to his comfort and happiness. The uncontradicted evidence in regard to the value of the different parts of his estate tended to show that the amount given to the widow by the will and codicil was less in value than she would have been entitled to receive if he had died intestate.

At the close of the evidence, the appellants asked the judge to instruct the jury as follows: "If the jury shall find, upon the evidence, that the relation of man and mistress existed between the testator and Annie Simonds up to the date of the marriage, and if they shall believe upon the evidence that the marriage was brought about for the purpose of unduly influencing the testator to make a will in favor of Annie Simonds, or in accordance with Annie Simonds's desire, the jury will be justified in rendering a verdict that the will was obtained by undue influence."

The judge declined to give this instruction, and instructed the jury that they had no right to consider, for the purpose of affecting the legal standing of the widow after the death of her husband, any questions as to who or which of the parties was most influential in bringing about the marriage; that they were to consider the question whether the will was procured by undue influence in reference to the relations existing when the will was made; that in the eye of the law her position at the time when the will was made, and at the time when the codicil was made, in reference to her relation to her husband, was precisely the same as that of the most honored wife in the land; that she had a right, when the will was made and when the codicil was made, to a share of his estate; and that if he had seen fit to make a will depriving her of a very large portion of his estate, and giving her little or nothing, the law gives her a right to waive the provisions of the will, and to have one third of all his personal property absolutely, and the use of one third of all his real

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estate for her life. To the refusal to give the instruction prayed for, and to what was said in regard to the widow's position in reference to her relation to her husband's estate, the appellants excepted.

The judge also said, in the course of the charge: "I am not aware of any direct evidence in this case that either the will or codicil was procured by undue influence of the wife of the testator. If there is any such evidence as that I have n't it in mind." To the statement in regard to direct evidence, the appellants excepted.

In the course of the charge, after referring to the occasion of January 12 and 13, 1892, the judge used the following language: "I do not remember that any witness has testified to any subsequent occasion when he exhibited conduct of that kind. You will inquire whether any witness has been called as an expert in regard to his mental condition, and has testified to anything indicating that he was afflicted with any form of insanity, at or about the time he made the will or the codicil, or at any time after this occasion in January, 1892, — any witness called as a medical expert upon diseases of the mind to give you an opinion upon any of the evidence which has been introduced, — anything which tends to show that he was afflicted with any kind of insanity. You have had the testimony of a great many witnesses who knew him for a long time, and who saw him more or less frequently nearly to the time of his death, many of them covering a time subsequent to the execution of the codicil. Many of them have testified to his appearance, mode of speech, actions, everything in his conduct that indicated his mental condition, and the substance of the testimony of a great many witnesses is, that, so far as they saw anything in his conduct, his mode of speech, or anything else, there was nothing to attract their attention indicating any change in his mental condition. Many witnesses have testified, as obviously has been proved from other circumstances in the case, that he grew more and more feeble in body up to the time of his death. Well, it is very evident that any feebleness of his body would necessarily affect the strength of his mind, but the substance of the testimony in regard to his mental condition was of the same general character, — that he was the same kind of a man, with the same soundness of mind, that they

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had always known and been familiar with. Nobody has testified to the contrary."

The judge further instructed the jury as follows: "Then you have had the introduction of papers before you which he executed, some checks, a letter to his sister written in the year 1892, his memorandum book with more or less of the entries upon it, and other things of that sort, from which you can tell somewhat whether he was a sane man or an insane man at the time of these several occasions, — whether he was in one condition or the other at the time of the execution of the will and codicil. You have had the particulars of those two occasions; a good many conversations have been introduced on one side and the other by a good many witnesses. You are to judge whether he talked like a man who was of sound mind within the meaning of the law, according to the definition which I have given, when considering that evidence with the other kinds of evidence of which I have already spoken. The case is not necessarily ended, or at least your inquiry is not limited by these considerations. You have the will itself and the codicil, and it is very important for you to look at the will and to look at the codicil, and all of its provisions, which will tend to indicate whether the man understood what he was doing, and was competent to do such a kind of business as he was then engaged in."

The appellants excepted to the statement that the substance of the testimony of a great many witnesses was that, so far as they saw anything in his conduct, etc., there was nothing to attract their attention indicating any change in his mental condition.

After the close of the charge, the appellants asked for the following instruction: "If the jury shall find that at the time of making the will or the codicil the testator was acting under any hallucination or delusion, or erroneous opinion amounting to delusion, as to facts in the conduct of any of the beneficiaries under the will, this will be evidence that at that time he was not of sound and disposing mind."

This request the judge did not give in terms, but instructed the jury as follows: "In regard to the question as to whether this testator was of sound and disposing mind, it is true, of course, that if a person is under an insane delusion in refer-

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ence to the subject matter, or has an insane delusion concerning a fact which affects his duty and responsibility in preparing a will, if such an insane delusion is proved, that would affect what would otherwise be considered a good will. The question, so far as that is concerned, is whether there is any insane delusion or hallucination which affects his conduct in the making of the will so that the will is not the will of a man of sound mind."

To the refusal to give the instruction as requested, the appellants excepted.

The jury returned a verdict in favor of the will upon all the issues; and the appellants alleged exceptions.

J. F. Simmons, for the appellants.

C. W. Bartlett, (*E. R. Anderson & W. H. Preble* with him,) for the appellee.

ALLEN, J. 1. The court rightly refused to give the first instruction which was requested. Bringing about a marriage with a view to the pecuniary benefits that may flow therefrom, either during the life or after the death of the one who has the most property, is no ground of invalidating a marriage, unless fraud or force is used. Nor is every kind of fraud available for this purpose. *Reynolds* v. *Reynolds*, 3 Allen, 605. *Foss* v. *Foss*, 12 Allen, 26. *Crehore* v. *Crehore*, 97 Mass. 330. After marriage, a husband or a wife may lawfully use persuasions to induce the other to make a favorable will, and such persuasions may even be proper. *Parfitt* v. *Lawless*, 2 P. & D. 462, 470. The relations between the parties are then greatly changed; and a husband and wife lawfully married and living happily together are bound to all conjugal duties towards each other, and none the less because illicit relations may have existed between them before marriage. In the present case, there was no evidence whatever that any deception was practised on the testator to induce him to enter into the marriage. The validity of the marriage was unquestioned and unquestionable, so far as the evidence showed. Even if the woman had been the testator's mistress to the time of the marriage, and had brought about the marriage for the purpose of unduly influencing him to make a will in her favor, or in accordance with her desire, as assumed in the request for instructions, there were other important facts to be considered, and the court might well decline to single out those

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particular facts and instruct the jury that from those alone they would be justified in rendering a verdict that the will was obtained by undue influence. Indeed, it would seem that the request might well be refused on the ground that there was no evidence to show that the marriage was brought about for the purpose of influencing him to make a will. She may have wished and expected to better her condition by the marriage, but there was no evidence that she contemplated the bettering of her condition after marriage by inducing him to execute a will in her favor, or that she in fact so influenced him. The will was not beneficial to her. If it were set aside, she would be the gainer thereby. She had an opportunity to influence him to make a will favorable to herself, or discriminating amongst his children, but that alone is not sufficient to go to the jury on. *Parfitt* v. *Lawless*, 2 P. & D. 462. *Cudney* v. *Cudney*, 68 N. Y. 148. *Main* v. *Ryder*, 84 Penn. St. 217. *Monroe* v. *Barclay*, 17 Ohio St. 302. The instructions which were given upon the subject of the request had reference to the legal relations which she sustained to her husband, and her legal position as his wife; and there was no error in explaining these in clear and unmistakable terms, especially in view of the fact that there was no testimony that she ever conversed with him on the subject of making a will, or that she knew of the making of the will or codicil, or of his intention to make either of them until the time when the codicil was in fact executed, and in view of the further fact that under the will she would get less property than if no will had been made. The instructions as given are not open to the objection that they were a charge upon the facts, in violation of Pub. Sts. c. 153, § 5.

2. The bill of exceptions states that the circumstantial evidence therein set forth, with other evidence of a similar kind, was the only evidence relied on to show that Mrs. Tyler used undue influence upon the testator to induce the making of the will or codicil. The court might properly state that there was no direct evidence. By express provision of statute, Pub. Sts. c. 153, § 5, the court may state the testimony; and if there is no direct testimony upon a point in issue, the court may so state to the jury.

3. There was no error in the way of stating to the jury what

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the testimony was. In stating testimony, it is not necessary, under the statute, to take the witnesses one by one, and give the words of each separately, but they may be grouped and the substance of the testimony of a group of witnesses may be given, provided it is fairly done. In the present case, there was no testimony from anybody of any incoherence in the testator's speech, or of any violence, or of any peculiarities of conduct or manner, except in certain particulars; and a great many witnesses, who said they were acquainted with him, testified in substance that they never noticed any change in his mode of speech, his manner, or in his conduct in any particular that attracted their attention as indicating a change in his mental condition. This testimony and want of testimony appear to have been stated to the jury with entire fairness.

4. The final request for instructions was rightly refused, and the instructions given were proper. In common untechnical speech, one may have delusions which do not imply or show unsoundness of mind. The request for instructions might have been understood to mean delusions of that kind. It was right, therefore, to limit the instructions to insane delusions, such as would go to show unsoundness of mind. *Brown* v. *Ward*, 53 Md. 376, 392. 1 Redf. Wills, 71, note, 86. The further criticism upon the instructions as given is without weight.

Exceptions overruled.

MARTIN W. FORD *vs.* WILLIAM L. DAVIS & others.

Suffolk. January 29, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Mortgage — Contemporaneous Agreement — Equity.

At the same time with the making of a mortgage of land conditioned for the payment of $2,200 and interest, an agreement under seal was executed by the mortgagor and mortgagee, by which, after referring to the mortgage, the former agreed to finish a house on the mortgaged land, the latter agreed to furnish the material, and the former covenanted to pay the cost of the material and $1,100 for the land; and it was then provided that the cost of the estate and the cost of the material, "whether more or less than said twenty-two hundred dollars

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shall be received in payment of said note and in discharge of said mortgage." *Held*, that the mortgagor was entitled to redeem the premises from the mortgage on paying the sum mentioned therein, although the sum due under the agreement was much larger.

BILL IN EQUITY, filed in the Superior Court, on August 31, 1891, against William L. Davis, Alice H. Davis, his wife, and Malcolm McLoud, to redeem certain premises in Chelsea from a mortgage given by the plaintiff to the female defendant and held by the defendant McLoud under an assignment. At the hearing, a decree was ordered for the plaintiff; and the defendants appealed to this court. The material facts appear in the opinion.

C. W. Bartlett & E. R. Anderson, for the defendants.

G. D. Williams, for the plaintiff.

HOLMES, J. This is a bill to redeem a mortgage conditioned for the payment of the sum of twenty-two hundred dollars and interest. At the same time with the making of the mortgage an agreement under seal was made by the mortgagor and the mortgagee and her husband, by which, after referring to the mortgage, the former agreed to finish a house upon the mortgaged land, the latter agreed to furnish the material, the mortgagor covenanted to pay the cost of the material and eleven hundred dollars for the land, and it was then provided that the cost of the estate and the cost of the material, "whether more or less than said twenty-two hundred dollars, shall be received in payment of said note and in discharge of said mortgage." The sum due under this agreement is over four thousand dollars, and the holder of the mortgage, who is an assignee standing in the shoes of the mortgagee, contends that the plaintiff is entitled to redeem only on paying the whole amount. The plaintiff claims the right to redeem on paying the sum mentioned in the mortgage. The case was sent to a master, and the Superior Court entered a decree in accordance with the plaintiff's view. The defendants appealed.

If the agreement purported to enlarge the amount of the mortgage, the question would have to be decided whether the express stipulation in the mortgage that it should be void on paying a certain sum could be contradicted by a contemporaneous agreement. *Flynn* v. *Bourneuf*, 143 Mass. 277. And that question would not be disposed of by the cases which decide

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that, where there is made a later contract that the mortgage shall stand as security for a further sum, a party coming into equity to obtain a discharge or to redeem must do equity and pay the whole as a condition of relief. *Joslyn* v. *Wyman*, 5 Allen, 62. *Stone* v. *Lane*, 10 Allen, 74. But the agreement does not contradict the mortgage in the event which has happened. It simply stipulates for the payment of a sum which may be, and which has turned out to be, larger than the mortgage, and provides that when that sum is paid it shall be a payment of the mortgage. Probably it is true, as both parties state in their arguments, that the mortgage was given to secure future advances. The agreement identifies the advances the repayment of which will satisfy the mortgage, but does not affect or purport to affect the extent of the security.

Decree affirmed.

GEORGE R. SWASEY, receiver, *vs.* THEODORE H. EMERSON & others.

Suffolk. January 29, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Reliance upon Prior Mortgage without Production of it — Unrecorded Assignment — Priority — Notice of Trust — Corporation — Evidence of Authority of President to execute Discharge — Equity.

If a mortgagee of land takes the mortgage in good faith and for value, relying upon the discharge of a prior mortgage and the title as it appears in the registry, and does not demand production of the discharged mortgage or the mortgage note, which are then outstanding in the hands of an assignee under an unrecorded assignment, the latter cannot maintain a bill in equity against the former to establish the invalidity of the discharge and the priority of the earlier mortgage.

Every grantee of land has notice that there may be a trust outstanding, but he is not called on to inquire about it, unless he has notice that there is one.

At the hearing of a bill in equity to establish the invalidity of a discharge, executed by the president of a corporation, of a mortgage given to the corporation, it appeared that he did most of the corporation's business in the city where it had its office, and, before executing this discharge, made many deeds on its behalf, each of which had attached to it a certificate of what purported to be a vote of the directors authorizing the deed, signed by the secretary; that a similar certificate was appended to this discharge; and a purported copy of a vote

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giving the president a general authority to discharge mortgages was put in evidence; and it also appeared that the records of the corporation were out of the State, and could not be produced. *Held*, that there was ample evidence that the president had authority to execute the discharge in question.

BILL IN EQUITY, filed March 19, 1895, by the receiver of the Debenture Investment Company, against Theodore H. Emerson, Julian A. Roett, the Boston Safe Deposit and Trust Company, and the American Loan and Trust Company, to have discharges executed by the Debenture Investment Company to Roett of three mortgages of land in Cambridge declared void and the mortgages entitled to priority over a mortgage of the same land executed by Roett to Emerson. Hearing before *Lathrop*, J., who dismissed the bill, and, at the plaintiff's request, reported the case for the consideration of the full court; such decree to be entered as justice and equity might require. The facts appear in the opinion.

G. R. Swasey & J. Nelson, for the plaintiff.

F. Ranney, for Emerson.

S. Lincoln & F. P. Sears, for the Boston Safe Deposit and Trust Company.

HOLMES, J. Early in 1893 one Rice executed three mortgages to the Debenture Investment Company, of which the plaintiff has been appointed receiver. In January, 1894, the company assigned and delivered these mortgages and notes to the Boston Safe Deposit and Trust Company, upon certain trusts for its creditors. The last named company delivered them to the American Loan and Trust Company, its successor in the trusts, and a new assignment was executed by the debenture company to the latter. None of the assignments were ever recorded. In November, 1894, after the assignment, the Debenture Investment Company executed discharges of the mortgages to one Roett, which were dated November 1, but acknowledged and recorded on November 12. The report states that Roett received conveyances of the equities on or about November 1, 1894. The date in the bill is November 7, and this is said by the defendants to be the true date, which it will be seen is later than the date of the discharges. But whatever the dates, we must assume, in accordance with the clear meaning of the report, that the discharges were made after Roett had become owner of the equities in the mortgaged land. At the same time that

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he received the discharges, Roett made a new mortgage of the land to Emerson, who took it in good faith and for value, relying upon the discharges and the title as it appeared in the registry. Emerson did not demand production of the discharged mortgages or the mortgage notes, which then were outstanding in the hands of the American Loan and Trust Company. This bill is brought to establish the priority of the earlier mortgages and the invalidity of the discharges. The justice who heard the case dismissed the bill, and reported the substance of the evidence.

The main argument for the plaintiff in a few words is, of course, that Emerson had notice of the mortgages and of the possibility that the notes might have been assigned by the mortgagee, as they had been in fact, in which case the right of the mortgagee to make the discharges was at an end, and that therefore he was bound to call for the notes before relying on the discharges, just as a mortgage debtor is bound to do before he can pay the debt to the mortgagee with safety, or as in the case of a would be purchaser of the mortgage debt. *Biggerstaff* v. *Marston*, 161 Mass. 101.

The argument for Emerson is equally obvious, and in our opinion must prevail. When the title to land is dealt with, the intent of the registry laws is that purchasers should not be required to look beyond the registry of deeds further than is absolutely necessary. The assignment of the mortgages was a conveyance within Pub. Sts. c. 120, § 4, which the assignees might have had recorded and in that way have protected themselves. Not having been recorded, it is invalid as against Emerson by the express terms of the statute. To give the American Loan and Trust Company a better claim against the land as holders of the notes than it got by the conveyance of the land is to defeat the statute by indirection. It does not claim by way of trust, as when the note is transferred without assignment of the mortgages, and if it did, to say that Emerson had notice of the trust, although not recorded under Pub. Sts. c. 141, § 2, really is to beg the question. He only had notice that there might be one. Every grantee of land has notice that there may be a trust outstanding, but he is not called on to inquire about it unless he has notice that there is one. See *Norman* v. *Towne*, 130 Mass. 52, 54. The principle on which we go is established by *Wolcott* v. *Winchester*, 15 Gray, 461. There the defendant's

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grantor bought of a mortgagee of land his interest in the mortgaged land. He owned the equity in a part of the land, and in a part he did not. It was held that his title as to the former portion was good as against a prior unrecorded assignment of the mortgage, although it followed the note as to the residue. See also *Morris* v. *Bacon*, 123 Mass. 58, 59 *ad fin.* Our opinion is supported by many decisions elsewhere. *Ladd* v. *Campbell*, 56 Vt. 529. *Williams* v. *Jackson*, 107 U. S. 478, 483, 484. *Bacon* v. *Van Schoonhoven*, 87 N. Y. 446, 451, 452. *Connecticut Ins. Co.* v. *Talbot*, 113 Ind. 373. *Daws* v. *Craig*, 62 Iowa, 515. *Ferguson* v. *Glassford*, 68 Mich. 36, 47. *Swartz* v. *Leist*, 13 Ohio St. 419. *Girardin* v. *Lampe*, 58 Wis. 267. *Henderson* v. *Pilgrim*, 22 Tex. 464.

The question is raised by the plaintiff as to the authority of the president of the debenture company to execute the discharges. The president did most of the company's business in Boston, and before executing these discharges made many deeds on its behalf, each of which had attached to it a certificate signed by the secretary of what purported to be a vote of the directors authorizing the deed. A similar certificate was appended to each of these deeds. There was also what purported to be a copy of a vote giving the president a general authority to discharge mortgages. The records were out of the State and could not be produced. The evidence of authority was ample. *Commonwealth* v. *Reading Savings Bank*, 137 Mass. 431, 440. See *England* v. *Dearborn*, 141 Mass. 590, 592.

Bill dismissed.

COMMONWEALTH *vs.* RICHARD CROWLEY.

Suffolk. February 1, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Manslaughter — Witness — Discretion of Court — Exceptions — Trial.

At the beginning of the trial of a criminal case, the judge, at the defendant's request, excluded the witnesses on both sides from the court room. B., who had taken notes at a former trial of the case, remained in court taking notes of the

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testimony as an assistant to the defendant's counsel. The trial lasted for two and one half days, the larger part of which was occupied by the government in putting in its case; and the government's witnesses were inquired of by the defendant's counsel if they had not testified at the previous trial differently from what they testified at this, and, when putting these questions, he apparently read from the notes of the previous trial, stating especially in each question facts at variance with those last testified to. He then called B. as a witness for the purpose of contradicting a witness for the government, by testifying that the latter's testimony on material points at the former trial had been different from that given at the present trial; and stated that, when the witnesses were excluded from the court room, he did not know that it would be necessary to call B. *Held*, that it was within the discretion of the judge to exclude the testimony of B.

No exception lies to the refusal to give an instruction requested which is not applicable to the facts proved.

There is no error in allowing the district attorney, in his argument to the jury at the trial of an indictment for manslaughter, to make the statement that "the defendant upon these facts might well have been indicted for the crime of murder," if there is no statement by him of any fact not in evidence and no misstatement of the evidence.

INDICTMENT for manslaughter, in causing the death of John E. Burns by stabbing him with a knife, on May 4, 1895, at Boston. After the former decision, reported 165 Mass. 569, the case was tried in the Superior Court, before *Bond*, J., who allowed a bill of exceptions, in substance as follows.

It appeared in evidence, on the part of the defence, that the defendant and his brother were in the saloon of one Jacobs on the evening of May 4, 1895, and that while there the defendant's brother David was struck by Burns; that Burns and David fought upon the sidewalk; and that they fell, and Burns, who was on top, struck David several times until they were separated by one Kilduff, one Ward, and others.

Ward, a witness for the government, testified that Burns struck David first, while another witness testified that David struck Burns first.

John F. Burk, a special police officer, testified that he led Burns to a passageway between Jacobs's saloon and the railroad; and that Burns said he was going down to go through.

While the struggle was going on upon the sidewalk, the defendant was there with others. The evidence was conflicting as to whether he assisted in separating the two men or not. After the struggle on the sidewalk, the defendant went back into the saloon; and his brother David testified that, after Burns was

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taken off from him, he ran across to the other side of the street, and heard some one say, "If we can get him we will murder him"; and that he then crossed the street, went back into the saloon, and said to the defendant, who was standing in the wholesale department of the saloon, "If we don't get out some back way they will murder us."

The defendant testified that, when David came into the door, and before he got near him, David said, "Dick, look out there, we are going to get murdered; is there any back door that we can get away?"

The defendant further testified that he was afraid to go out; that he did not know whether it was best to stay in or to go out; that after that he went and got a knife; that he then asked Ward to let them out the side door; that Ward opened the side door, which was but little used, and, looking up and down the street and seeing that the crowd had got over on the other side of the street and away from that corner, told the brothers the place was clear; that thereupon they left the saloon, crossed the tracks of the Boston and Providence Railroad on New Heath Street, and continued along that street, when, near the corner of Bromley and New Heath Streets, on the latter street, "the first thing I knew I saw a man passing me; I looked at him, and when I saw the man I knew it was one of the crowd; I yelled at the top of my voice, 'Here they are; they will kill us, they will murder us.' I sang that out as loud as I could; after this man passed, I looked around to see if there was any one behind me, and the whole crowd were coming right along. They struck me on my head and threw me on my face and hands, and I was thrown a second time. As I was getting up, the man got his arm around my neck, and commenced to hit me in the face; I could not do anything to save myself; I had no chance to get away from him; I was stooping down with his arm around my neck, and he commenced to hit me in the face, split my lip, and choked me, and took away my breath. My wind was right out of me; I could not stand it a second longer. I had this knife in my hand, and I raised it up, when I felt his hold get loose of me. I did n't intend to kill him, — I did n't know that I had killed him."

It appeared that the defendant took the knife in question from

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a table in the saloon after his brother came in from the street and told him that they were going to be murdered.

It appeared from the government's witnesses that, a short time after the trouble had occurred between David and Burns upon the sidewalk, Burns came out of the saloon, went down a passageway parallel to the railroad track and crossed over the railroad and went into a doorway on New Heath Street, where he was standing when the defendant and his brother went by on their way home; that he met in the doorway three young men, and talked with them; that he said, when the defendant and his brother came along, "There they come now"; and that he followed them, and the trouble began; and that it was in this locality that Burns was killed.

It also appeared that Burns was going in the opposite direction from his home, and that the defendant and his brother, when walking on New Heath Street, were going directly toward their own home; that Burns weighed between one hundred and eighty and two hundred and ten pounds, and was very muscular; and that the defendant and his brother were smaller men, David weighing about one hundred and fifty pounds.

The government contended, and introduced testimony tending to show, that there was no justification or occasion for the use of the knife by the defendant. There was no evidence that Burns was armed in any way.

At the beginning of the trial, by order of the judge, the witnesses on both sides were excluded from the court room at the defendant's request. The defendant's counsel offered as a witness Louis N. Bennett, who took the evidence at a former trial of this case, for the purpose of contradicting the testimony of a witness for the government by the name of Mary Swift, she having testified at the former trial upon material points as to which she testified differently at the present trial.

The defendant's counsel stated that, when the witnesses were excluded from the court room, he did not know that it would be necessary to call Bennett to rebut Swift's testimony; and that he had excluded in good faith all the witnesses at the time of the beginning of the trial that he intended to call, and did not then know that he would be obliged to call any witnesses for the purpose of rebutting the testimony of a witness for the government.

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The trial lasted for two and one half days, the larger portion of which was occupied by the government in putting in its case. Several of the government's witnesses were inquired of by the defendant's counsel if they had not testified at the previous trial differently from what they testified at this. The counsel when putting these questions apparently read from notes of the previous trial, stating especially in each question facts at variance with those last testified to. Bennett sat at the counsel's table, taking testimony as an assistant, during all the time that the government's case was going in and during all the time that the defendant's case was going in, and was the last witness called for the defence, the defendant and his brother being the other witnesses.

Mary Swift was one of the last witnesses called by the government in its direct case. The defendant's counsel did not offer Bennett for the purpose of contradicting any other government witness. The judge excluded the testimony of Bennett; and the defendant excepted.

The defendant requested the judge to instruct the jury as follows: "Where one is attacked by another on the highway, who manifestly attempts by violence to take his life or to do him great bodily harm, and under such circumstances no retreat being practicable, he is not only not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing, and in trying to get away, it is justifiable self-defence and he should be acquitted."

The judge declined to give this instruction, and instructed the jury upon this point as follows:

"The issue is, the killing having been proved, whether the killing was lawful or unlawful. The defendant claims that the killing was in self-defence; it is on this ground that it is claimed by the defendant to have been lawful. When a person is assailed and he, acting under a reasonable apprehension that he is in imminent danger of death or great bodily harm, and that it is necessary for him to strike a fatal blow, that there is no other way to escape, he has the right to protect himself even to the extent of taking the life of his assailant. The person must be assailed. He would not have the right to assume that the deceased intended to assault him, and therefore to give him a fatal

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blow; there must be some assault upon him at the time; there must be some overt act by the deceased at the time; when there has been a prior assault, but no overt act, at the time of the homicide, a killing is not justifiable. With reference to the reasonable apprehension of the defendant, this is to be considered from the standpoint of the defendant at the time of the homicide. The jury should consider the situation as it looked to him, not necessarily as he says now it looked to him, but as it looked to him then. Consider all that took place in the bar-room and outside on the sidewalk; what he had seen and heard there are to be considered as circumstances bearing on the defendant's situation. You are also to consider all that took place where the homicide took place: put yourselves in the place of the defendant at the time of the fatal blow, and determine on all the evidence how it looked to him. By imminent danger is meant immediate danger, such as must be met instantly, and cannot be guarded against by retreat or by calling upon others. . . .

"By great bodily harm is meant great personal injury. A mere personal indignity, or a mere battery from which great bodily harm cannot reasonably be apprehended, will not excuse a person in taking the life of his assailant.

"It must appear that the defendant endeavored to avoid any further struggle and retreated as far as he could until there was no probable means of escape; then, and not till then, can he kill his assailant. You should determine the facts, — what took place at the saloon, what took place at the corner when Burns was killed, and then determine whether under the law the killing was lawful."

The defendant excepted to the refusal to give the ruling requested.

The district attorney, in his closing argument to the jury, made the following statement: "The defendant upon these facts might well have been indicted for the crime of murder"; to which statement the defendant's counsel, at the time the words were spoken, made an objection, upon the ground that the defendant was on trial only for manslaughter. The judge did not stop the district attorney, and thereafterwards he repeated the statement, in substance, several times; and the defendant excepted. The jury returned a verdict of guilty; and after the verdict and

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before sentence the defendant filed a motion in arrest of judgment, for the following reasons:

"1. Because this court has no constitutional power or right to pass judgment and sentence, since the law upon which sentence is now moved for went into effect subsequent to the commission of the offence for which the defendant was tried, and because there is no law now authorizing sentence in this case.

"2. Because the law under which it is proposed to pass sentence is illegal and void, because the term of imprisonment is indefinite and unusual, and because by sentencing this defendant thereunder he would be deprived of his liberty, contrary to the law of the land, and in violation of the Constitution of the United States and of this State.

"3. Because this court now has no right or power to sentence this defendant.

"4. Because the defendant took exceptions at his trial which have not yet been passed on by the court."

The judge overruled the motion; and the defendant alleged exceptions.

W. H. Baker, for the defendant.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

ALLEN, J. The objection most relied on relates to the exclusion of the evidence of Bennett. At the beginning of the trial, the presiding judge had passed an order, at the defendant's request, excluding the witnesses on both sides from the court room. There was no exception in favor of Bennett, or of any class of witnesses; and Bennett did not withdraw, but remained in court, taking notes of the testimony as an assistant to the defendant's counsel. He had also taken notes at a former trial of this case; and he was now called as a witness for the purpose of contradicting a witness for the government, by testifying that the latter's testimony on material points at the former trial had been different from that given on the present trial.

The defendant's counsel stated to the court that, when the witnesses were excluded from the court room, he did not know that it would be necessary to call Bennett, and that he had excluded all the witnesses at the time of the beginning of the

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trial that he intended to call, and did not then know that he would be obliged to call any witnesses for the purpose of rebutting the testimony of a government witness.

The bill of exceptions, however, goes on to recite that the trial lasted for two and one half days, the larger part of which was occupied by the government in putting in its case; that several of the government witnesses were inquired of by the defendant's counsel if they had not testified at the previous trial differently from what they testified at this; and that the counsel when putting these questions apparently read from notes of the previous trial, stating especially in each question facts at variance with those last testified to. From this recital we infer that the court thought that the defendant's counsel was in fault, after having procured the order of exclusion of the witnesses, in not causing Bennett to withdraw during the progress of the trial, and as soon as the idea occurred to him of contradicting any of the government witnesses by calling Bennett with his notes of their former testimony. Although in fact Bennett was only offered to contradict a single witness, the cross-examination of several of the government witnesses indicated that the counsel might have it in mind to call him as to their testimony also. The facts recited in the bill of exceptions warranted the judge in thinking the defendant's counsel was in fault, and therefore the question of law which is presented for our determination is whether on this assumption he might lawfully exclude Bennett's testimony. We are not called upon to determine what the rule should be in a case where the party himself and his counsel are free from fault.

Under the circumstances stated, we are of opinion that it was within the discretion of the court to exclude the testimony. In *Holder* v. *United States*, 150 U. S. 91, it is said, "The right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." This right, where the party or his counsel has been in fault, is directly or by implication supported by various decisions, and sanctioned by text writers. *State* v. *Gesell*, 124 Mo. 531. *O'Bryan* v. *Allen*, 95 Mo. 68, 75. *Dyer* v. *Morris*, 4 Mo. 214. *State* v. *Thomas*, 111 Ind. 515. *Burk* v. *Andis*, 98 Ind. 59, 64. *Davis* v. *Byrd*, 94 Ind. 525. *Jackson* v. *State*, 14 Ind. 327. *Bird* v. *State*, 50

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Ga. 585. *Hey* v. *Commonwealth*, 32 Grat. 946, 949. *Hubbard* v. *Hubbard*, 7 Oregon, 42. 1 Bish. Crim. Proc. § 1191. Whart. Crim. Ev. § 446.

The defendant's request for instructions as to the right of one who is attacked to pursue his adversary was rightly refused. There was no testimony in the case which tended to show that the defendant pursued his adversary after being attacked. On the other hand, his own testimony was explicit to the contrary. His account of the fatal occurrence was as follows: "As I was getting up, the man got his arm around my neck, and commenced to hit me in the face; I could not do anything to save myself; I had no chance to get away from him; I was stooping down, with his arm around my neck, and he commenced to hit me in the face, split my lip, and choked me, and took away my breath. My wind was right out of me; I could not stand it a second longer. I had this knife in my hand, and I raised it up, when I felt his hold get loose of me. I did n't intend to kill him, — I did n't know that I had killed him." The instructions asked for were not applicable to the case in hand, and were rightly refused. *Drake* v. *Curtis*, 1 Cush. 395, 414. *Coker* v. *Ropes*, 125 Mass. 577. *Salomon* v. *Hathaway*, 126 Mass. 482. *Pratt* v. *Amherst*, 140 Mass. 167.

The defendant contends that the argument of the district attorney to the jury was objectionable in saying that "the defendant upon these facts might well have been indicted for the crime of murder." The indictment was for manslaughter. There was no statement by the district attorney of any fact not in evidence, and no misstatement of the evidence. The defendant's objection rests on the ground that this argument was a charge of an offence for which he was not on trial. But we see no legal error in allowing the district attorney to urge that the facts in evidence showed a homicide of a higher grade than that for which the defendant was indicted. Nor can we say that this view of the facts was not warranted by the evidence.

The points urged in support of the motion in arrest of judgment are covered by the recent decision in *Commonwealth* v. *Brown*, 167 Mass. 144.

Exceptions overruled.

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COMMONWEALTH *vs.* JONATHAN G. HUNTON & others.

Middlesex. February 1, 1897. — February 27, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Conspiracy — Law and Fact — Evidence — Trial — Instructions.

A., who was a member of a committee of the common council of a city which had power to buy horses, bought several horses for himself; and B. was notified that A. had some horses. On a certain day a meeting of the committee was called in the absence of the chairman and contrary to his request, and the committee left the city hall for supper and continued their meeting at a hotel, where they appointed a sub-committee, of which A. was a member, to buy horses. On the next day A. sold his horses to B., the horses being left in the stable where A. was keeping them; and on the following day the sub-committee, including A., bought the horses of B. for the city at $200 apiece. A. was unwilling to disclose the prices paid by him for the horses, but they averaged about $100. Both A. and B. refused to testify before an investigating committee as to the price paid by B. to A. for the horses, and the notes given for the price, when produced, had their figures cut out. B. testified before the investigating committee, that, at the time of his purchase, he talked with A. about selling the horses to the city; but A. did not admit this. *Held*, at the trial of an indictment under Pub. Sts. c. 205, § 12, against A. and B., charging a conspiracy for the sale of the horses to the city, that the case was rightly submitted to the jury.

The jury in a criminal case are absolutely free to believe what is unfavorable to the defendant in his statement, and to disbelieve all that is favorable, if the character of the statement has that effect upon their minds.

The voluntary statements of alleged conspirators before an investigating committee of a city council, of which one of them was a member, are admissible in evidence at the trial of an indictment against them for the conspiracy.

At the trial of an indictment for conspiracy, if the effect of each statement made by the defendants before an investigating committee of a city council of which one defendant was a member is, when admitted in evidence, limited to the party making it, a ruling that the statements were evidence tending to show the part which each took in the conspiracy, if any conspiracy was proved, and that there was concerted action between them, is not open to exception.

INDICTMENT, under Pub. Sts. c. 205, § 12, against Jonathan G. Hunton, Fred A. George, Hugh Maguire, Jr., Cleveland J. Cheney, and Charles Clapp, for conspiracy. At the trial in the Superior Court, before *Hardy*, J., the jury returned a verdict of guilty against Hunton and Clapp only; and they alleged exceptions, which appear in the opinion.

J. C. Burke & J. J. Hogan, for the defendants.

F. N. Wier, District Attorney, (*G. A. Sanderson* with him,) for the Commonwealth.

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HOLMES, J. This is an indictment under Pub. Sts. c. 205, § 12, charging a conspiracy between the defendants for the sale to the city of Lowell of certain horses belonging to the defendant Clapp while the defendant Hunton was a member of the common council, and that Hunton should receive a reward from Clapp. Hunton and Clapp were found guilty, and the case is here on their exceptions to the refusal to rule that there was no evidence warranting their conviction, and to a ruling as to the admissibility of testimony which will be stated later.

The undisputed facts are enough to show that the case could not be taken from the jury. Hunton was a member of the committee on streets, which had power to buy the horses. On April 8 he bought for himself three of the horses in question, and on Saturday, April 11, he bought five. On Sunday Clapp was notified that he had some horses. On Monday, April 13, a meeting of the committee on streets was called, in the absence of the chairman, who returned the next day; and, according to his testimony, contrary to his request. The committee left the city hall for supper, and continued their meeting at a hotel, where they appointed a subcommittee of three to buy the horses. One of these was Hunton, who was present. On Monday Hunton sold the eight horses to Clapp, the horses being left in the stable where Hunton was keeping them. On Tuesday morning Hunton and the other two members of the subcommittee bought the horses of Clapp for the city. The prices paid by Hunton averaged certainly not much over, and probably under, a hundred dollars. Hunton was unwilling to disclose them. The price paid by the city was two hundred dollars apiece. When called before an investigating committee at the city hall, Hunton and Clapp both refused to tell the price paid to the former by Clapp. The notes given by him, when produced, had their figures cut out. We do not think it necessary to add more, except, as bearing on Clapp's knowledge and participation, that he testified before the investigating committee that at the time of his purchase he talked with Hunton about selling the horses to the city. This Hunton did not admit.

It is quite true that each of the defendants Hunton and Clapp, in their testimony before the investigating committee,

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which was read in evidence at the trial, accompanied their admission of facts with a denial of any illegal conduct, and offered explanations of whatever seemed to need it. But that did not entitle them to have their case taken from the jury. They had the benefit of having those denials and explanations read with the rest of the statements, and that was all they were entitled to demand. The mistake in the argument addressed to us on their behalf is in the assumption that, so far as not contradicted by other evidence, they had a right to have all their testimony taken to be true. That is not the law. The jury are absolutely free to believe what is unfavorable to a prisoner in his statement, and to disbelieve all that is favorable, if the character of the statement has that effect upon their minds. *Jefferds* v. *Alvard*, 151 Mass. 94. Roscoe, Crim. Ev. (8th Am. ed.) 55.

An exception to the admission of the statements of the alleged conspirators before the investigating committee is not much pressed. The testimony was voluntary so far as appears. See *Commonwealth* v. *Wesley*, 166 Mass. 248. The effect of each statement when it was let in was limited to the party making it. At the close of the evidence a ruling was asked that the evidence could not be used as tending to establish a conspiracy. The judge refused this, and ruled that it was evidence tending to show the part which each took in the conspiracy, if any conspiracy were proved, and that there was concerted action between them. It is argued that this was an erroneous reversal of the limitation set upon the effect of the statements at first. We do not construe it in that way. We understand the ruling simply to mean that, so far as any party admitted facts tending to show concerted action between the defendants, the admission was evidence of such concert, subject to the original restriction, that is, as against the party making it. This was correct. *Commonwealth* v. *Smith*, 163 Mass. 411, 418. If each of these defendants admitted a conspiracy, or facts warranting the inference of a conspiracy, although the admission of one could not affect the other, still a conspiracy might be found to have been proved. In this case Hunton, either by his own statements or by competent evidence, knew all the facts which we have stated, except, perhaps, how Clapp was informed that he had the horses. Clapp admitted notice to him of Hunton's purchase, Hunton's sale to

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himself, and his sale to the city through Hunton the next day. He admitted talking about selling to the city at the time of his purchase. It is true that he did not admit knowledge of what Hunton paid, but what he did admit, coupled with his conduct at the hearing before the investigating committee, made it a possible, if not a probable, inference that he knew more than he was willing to tell about other matters beside what he was to pay Hunton. *Exceptions overruled.*

LAURA C. KING *vs.* JOHN M. DAVIS.

Middlesex. November 12, 1896. — March 1, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Statute of Limitations — Acknowledgment of Debt.

An account stated gives a new and original cause of action, and the statute of limitations begins to run only from its date.

A writing was signed by the debtor underneath a statement of the mutual accounts of the debtor and creditor in these words: "The above statement is correct, and I owe the balance as above due. J. M. D. June 13, 1887." *Held*, that this was a sufficient acknowledgment to take the debt out of the statute of limitations.

CONTRACT, on an account stated. Trial in the Superior Court, without a jury, before *Braley*, J., who found for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

F. Hunt, for the defendant.

J. A. Stockwell, for the plaintiff, was not called upon.

LATHROP, J. It appears from the evidence reported that the defendant had been a tenant of the plaintiff, and was in arrears for his rent, though he had made some payments on account. About the time he left the plaintiff's house, the agent of the plaintiff called upon him, taking with him a written statement of their mutual accounts, and showing a balance due of $263.91. After some conversation, the defendant wrote on the paper underneath the account the following: "The above statement is correct, and I owe the balance as above due. John M. Davis.

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June 13, 1887." The only item of the account rendered which is dated is the last one on the debit side, and the date of this is April 20, 1887. The writ is dated June 10, 1893. The judge found and ordered judgment for the plaintiff; and the case comes before us on the defendant's exception to the refusal of the judge to rule that the plaintiff's claim was barred by the statute of limitations.

The defendant first contends that the action is not brought within six years from the last item of the debit account, and is therefore barred by the Pub. Sts. c. 197, § 1, cl. 1. But this is not an action upon the original items, but upon the account stated, and the action is brought within six years from the date when this cause of action accrued. An account stated gives a new and original cause of action, and the statute of limitations begins to run only from its date. *Chace* v. *Trafford*, 116 Mass. 529.

The remaining question is whether there is a sufficient acknowledgment or promise in writing within the Pub. Sts. c. 197, § 15. This question has so recently been considered by us in the case of *Custy* v. *Donlan*, 159 Mass. 245, that we need only to say that the question must be answered in the affirmative.

Exceptions overruled.

GUSTAV A. WALD *vs.* W. T. ARNOLD & trustee.

Suffolk. January 21, 1897. — March 2, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Contract — Statute of Limitations.

On April 8, 1895, A.'s attorney wrote B. that a bill for a certain amount of A. against B. had been placed in his hands for collection. On April 11, B. replied, "Your letter received and wish to say that I cannot pay it, and I don't know when I can." B.'s letter stated further the work he was doing, and the amount which he regarded as due on the bill. *Held*, that B.'s letter did not waive the bar of the statute of limitations.

CONTRACT, on an account annexed. Writ dated May 2, 1896. The case was submitted to the Superior Court, and, after judg-

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ment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows.

On April 8, 1895, the plaintiff's attorney wrote the defendant substantially as follows: "A bill against you has been placed in my hands for collection. The amount of the bill is $77.91, plus interest. Please give this matter your immediate attention."

On April 11, 1895, the defendant wrote a letter to the plaintiff's attorney, of which the following is a copy: "Your letter received, and wish to say that I cannot pay it, and I don't know when I can. Last week I got in two days' work, and one day this, so far. And furthermore the bill is $55.70 in all, deducting $20.00 on my last payment."

The debt due the plaintiff upon the account annexed to the plaintiff's declaration was $55.70, and the last item thereof was upon January 11, 1890. It was agreed that the defence of the statute of limitations must prevail unless the above letter of the defendant Arnold was sufficient to take the debt out of the statute.

S. W. Wagner, for the plaintiff.

F. L. Norton, for the defendant.

HOLMES, J. The theory on which an acknowledgment or new promise takes a debt out of the statute of limitations is that it waives the bar of the statute. *Ilsley* v. *Jewett*, 3 Met. 439, 445. See *Bigelow* v. *Norris*, 139 Mass. 12. Therefore were the matter a new one, perhaps the question might be raised whether an acknowledgment before the statute had run, when there was nothing to waive and the liability was undeniable, ought to have any effect. But probably the whole doctrine is a relic of the time when the statute was regarded with disfavor and evaded as far as possible; Langdell, Con. § 73; *Bangs* v. *Hall*, 2 Pick. 368, 372, 373; and the distinction suggested has not been observed. In *Custy* v. *Donlan*, 159 Mass. 245, the acknowledgment was signed before the statute had run on the last two items recovered. So the statute had not run at the date of the letter relied on in *Krebs* v. *Olmstead*, 137 Mass. 504. See also *Penniman* v. *Rotch*, 3 Met. 216, 218; *Carlton* v. *Ludlow Woolen Mill*, 27 Vt. 496; *Patton* v. *Hassinger*, 69 Penn. St. 311, 315; *Mastin* v. *Branham*, 86 Mo. 643, 651; Pollock, C. B., in *Cornforth* v. *Smithard*, 5 H. & N. 13, 14. We assume that no question is open upon this point.

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But we are of opinion that the letter is not a waiver of the statute bar. When it is said in *Custy* v. *Donlan*, 159 Mass. 245, 246, that an unqualified acknowledgment of a debt as an existing debt is conclusive, the remark is perfectly true of such an acknowledgment as was before the court, which on its face imported an admission that at that time there was no defence. So as to the letters passed on in *Barnard* v. *Bartholomew*, 22 Pick. 291, *Cornforth* v. *Smithard*, 5 H. & N. 13, and *Quincey* v. *Sharpe*, 1 Ex. D. 72. But it is not meant that an admission of the undeniable facts that a debt has been incurred, and has not been satisfied, will waive the statute. The language used must go further than that. The letter before us stops at that point. It states a present inability to pay, holds out no hope for the future, impliedly admits no more than that the defendant did incur a certain debt in the past, and leaves the plaintiff to consider what he will do next. It goes no further than the acknowledgment which was held insufficient in *Krebs* v. *Olmstead*. See also *Weston* v. *Hodgkins*, 136 Mass. 326.

Judgment for the defendant.

S. K. EDWARDS HALL COMPANY & others *vs.* SYLVESTER DRESSER.

Worcester. October 1, 1896. — March 5, 1897.

Present: FIELD, C. J., HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Deed — Reservation — Easement — Master's Findings — Equity Practice.

The reservation of an easement to one not a party to the deed is void.

If the finding of a master to whom a suit in equity has been referred is confirmed by the Superior Court, it will not be reversed by this court, unless it clearly appears to be erroneous.

If a deed of land reserves to the grantor a right of way over it, unless the grantee shall provide some other and convenient way over his adjoining land in its stead, the subsequent acceptance by the grantee of a deed of other adjoining land containing a reservation to the grantor therein of a right of way over it will not operate as the substitution by the grantee of a new way for the grantor in the first deed.

A finding of the master to whom a suit in equity has been referred, which seems to

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be immaterial, will not be disturbed, especially if the evidence reported shows some testimony in its favor.

Under the 31st chancery rule an exception to a master's report, which is not founded upon an objection filed before the master, will be overruled.

The plaintiff in a suit in equity, which has been referred to a master, is not injured by the master's statement that the plaintiff could not maintain his bill upon the facts reported.

An exception to a master's report, which contains no specification such as is required by the 32d chancery rule, will not be considered.

BILL IN EQUITY, filed in the Superior Court on December 26, 1893, to establish a right of way over the defendant's land in Southbridge. A decree was entered, dismissing the bill; and the plaintiffs appealed to this court. The facts appear in the opinion.

A. J. Bartholomew & J. M. Cochran, for the plaintiffs, submitted the case on a brief.

F. P. Goulding, (*F. L. Dean* with him,) for the defendant.

LATHROP, J. This is a bill in equity, filed in the Superior Court on December 26, 1893, in which the first named plaintiff claimed to be entitled to a right of way over the defendant's land. The bill also contained an allegation that the proprietors of the John Edwards estate had also a similar right of way. Subsequently certain persons, describing themselves as trustees of the estate of John Edwards, filed a motion alleging that they owned certain land, and were interested in the right of way set forth in the bill, and asked that they be allowed to become parties plaintiff. This motion was granted. After an answer and a replication were filed, the case was sent to a master, who made various findings of fact, and further found that the plaintiffs could not maintain their bill. The master also reported the evidence. The plaintiffs filed several objections and exceptions to the report of the master, and the defendant filed one objection and exception.

It appears from the master's report that the first named plaintiff owns two lots of land, with buildings upon them, on the southerly side of Main Street in Southbridge. The defendant owns a lot lying between the plaintiff's lots. On it is a building with an open driveway on the westerly side, about twelve feet wide. Beyond the first lot of the plaintiff is a lot owned by the trustees of the estate of John Edwards. To get from the

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plaintiff's first lot in the rear to the passageway, it would be necessary to cross the lot of the defendant in the rear of the building thereon. The plaintiff's second lot abuts on the passageway.

1. The first exception of the plaintiffs relates to the right of the trustees of the estate of Edwards to use the passageway. The only deed which bears upon this is a deed from William Edwards to the defendant, dated May 1, 1860, in which is this clause: the grantor "reserving to himself, his heirs and assigns, and to John Edwards, the right to pass in and over the said premises to and from the land in rear of their store, whenever they shall desire, unless the said Dresser, his heirs or assigns, shall provide some other and convenient way over his other land adjoining the said premises on the north, to the parties aforesaid in its stead." John Edwards was not a party to the deed, and the reservation to him was void. 1 Shep. Touch. (Prest. ed.) 80. 1 Washb. Easements, (4th ed.) 34.

2. The second exception relates to a finding by the master that the plaintiffs had not acquired a right of way by prescription. The evidence on this point was conflicting. The finding of the master has been approved by the justice who heard the case in the Superior Court. Unless it was clearly wrong, it should not be reversed. An examination of the evidence does not satisfy us that the finding was wrong, and it must therefore stand. *Morrell* v. *Kelley*, 157 Mass. 126, and cases cited. *Debinson* v. *Emmons*, 158 Mass. 592. *Biggerstaff* v. *Marston*, 161 Mass. 101. *Wentworth* v. *S. A. Woods Machine Co.* 163 Mass. 28. *Lundin* v. *Schoeffel*, 167 Mass. 465.

While there was some evidence that there was a defined way across the defendant's land in the rear of his building, there was also evidence that this rear land was used as a dumping place for rubbish, and that persons drove over the land wherever they could, and that there was no defined way. The case on this point is very similar to *Starkie* v. *Richmond*, 155 Mass. 188, 196. See also cases therein cited. The second exception must be overruled.

3. The third exception relates to the finding of the master that there was no evidence that the defendant ever provided a suitable and convenient way over his other land adjoining the

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premises conveyed on May 1, 1860. The clause of this deed relating to the matter we have already set forth. The only oral evidence on this point came from the defendant, who testified, "I never provided a new way, or took any steps, and was never asked to." The plaintiff, however, contends that this new way is to be found in the defendant's acceptance of a deed from William Edwards to him, dated July 23, 1876. This deed conveyed to the defendant a strip four feet wide, and in depth extending to the south line of Edwards's land, lying between his lot and the defendant's, reserving to himself, his heirs and assigns, and to the estate of John Edwards, deceased, the right of passing over said tract to said street as now owned, used, and occupied, and as occasion requires. The only legal effect of the clause was to reserve a right of way to the grantor and his heirs over the strip conveyed. It had no effect on any other land of the grantee.

4. The fourth exception relates to the finding of the master that there was no well defined way over the defendant's rear land. This is disposed of by what we have already said as to the second exception.

5. The fifth exception relates to the finding of the master that there was no evidence that the defendant had obstructed the right reserved in the deed of May 1, 1860, from William Edwards to the defendant. We do not understand that the right of way reserved in this deed refers to the right of way in controversy. The finding of the master seems, therefore, to be immaterial. Moreover, the evidence reported shows some testimony on this point in favor of the master's finding.

6. The sixth exception relates to certain facts which it alleges that the master should have found, but has not found. The record shows that this exception is founded upon no objection filed by the plaintiffs to the master's report. This exception must, therefore, be overruled. Chancery Rule XXXI.

7. The seventh exception is as follows. That the master has found that the plaintiffs cannot maintain their bill upon the facts reported, whereas the same is matter of law to be determined by the court, and contrary to the proofs submitted to him.

Whether the master could or could not state the conclusion of law which he was of opinion was the result of the facts found

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by him need not be considered. The plaintiffs were not injured thereby, as the court must finally determine what the law is on the facts as they may be determined to be.

So far as the exception set forth that the conclusion of the master is contrary to the proofs submitted to him, there is no specification as is required by Chancery Rule XXXII.

On the report of the master it sufficiently appears that the plaintiffs have failed to prove that they have, or that either has, the right of way over the defendant's land, as alleged in the bill.

It becomes unnecessary, therefore, to consider the exception taken by the defendant to the master's report.

Decree affirmed.

MARY E. MESSER *vs.* THE FADETTES & others.

Suffolk. December 10, 1896. — March 5, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Trademark — Assignability of Trade Name — Equity.

A. organized an orchestra, giving it a certain name, and hired and paid the members of it. He afterwards sold to B. all his right, title, and interest in and to the organization, "together with all rights acquired in and to the establishment, name, and trademark in the words" composing the name, and then ceased to have any connection with it. The other members of the orchestra were not parties to the contract, and did not agree to continue to play under the management of B., but subsequently withdrew from the organization, and with others formed a corporation under the name invented by A. *Held*, that B. could not maintain a bill in equity to restrain the use of such name. LATHROP, J., dissenting.

BILL IN EQUITY, filed in the Superior Court, to restrain the use of an alleged trade name. Hearing before *Braley*, J., who found the following facts.

On October 1, 1888, Ethel Atwood organized an orchestra composed exclusively of women musicians, and selected as a name for such organization "Fadette Ladies' Orchestra," and afterwards advertised the services of such orchestra throughout New England. Such organization became well known to the

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musical profession, and to the public generally, in a favorable manner, under the name "Fadette Ladies' Orchestra," by reason of the character and quality of the musical entertainments given by it; and its success was due to the ability, skill, and personal supervision of said Atwood. It did not appear that prior to the transaction between the plaintiff and Atwood, hereinafter referred to, any organization distinguished by the name of "Fadette" existed, except the one organized by Atwood. On October 18, 1895, Atwood, for a valuable consideration, sold and conveyed to the plaintiff "all my right, title, and interest in and to the organization known as the 'Fadette Ladies' Orchestra,' . . . together with all rights acquired in and to the establishment, name, and trademark in the words of 'Fadette Ladies' Orchestra,'" and ceased any further connection with it. Afterwards the plaintiff gave at least one or more entertainments under the name of the "Fadette Ladies' Orchestra." At the time of the sale, and for a short time thereafter, the orchestra was composed substantially of the same membership as before the sale. Subsequently, Caroline B. Nichols, Jenny P. Daniel, and Viola M. Dunn, and others composing the orchestra, left it and organized an association under the name of "The Fadettes," which association duly became a corporation, under Pub. Sts. c. 115, and thereafter gave musical concerts, and used in advertising such concerts, as well as holding itself out for engagements, the name "Fadette Ladies' Orchestra."

On January 14, 1896, the plaintiff filed this bill to enjoin the defendant organization from using the name "Fadette." At the time the bill was filed no member of the original organization, except the plaintiff, remained.

The organization formed by Atwood had no place of business; engagements were made through Atwood, who had a room in Boston, and the different members were notified by her when they were wanted.

All of the members of the original organization were hired by Atwood, and were paid from time to time by her for their services.

The members of the orchestra, while knowing of the proposed trade between the plaintiff and Atwood, did not assent or agree to continue under the direction or management of the plaintiff.

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The judge dismissed the bill; and the plaintiff appealed to this court.

R. W. Light & C. F. Light, for the plaintiff.

T. J. Barry, for the defendants.

KNOWLTON, J. Ethel Atwood organized and employed a band of musicians called the "Fadette Ladies' Orchestra," and hired and paid the members of it. She sold to the plaintiff all her "right, title, and interest in and to the organization known as the 'Fadette Ladies' Orchestra,' . . . together with all rights acquired in and to the establishment, name, and trademark in the words of 'Fadette Ladies' Orchestra,'" and then ceased to have any connection with the company. The other members of the orchestra were not parties to the contract, and did not agree to continue to play under the direction or management of the plaintiff. At the time when the plaintiff brought this suit no member of the original organization remained with her. The question is whether the plaintiff acquired a right in the trademark or trade name which she can enforce by way of injunction against the defendant corporation, some of the members of which were members of the original organization.

It is very clear that this question must be answered in the negative. So far as Ethel Atwood had any right or ownership in the trade name which designated the organization under her management, it was personal to herself, depending upon her personal reputation and skill, and it was not assignable. The other musicians employed by her could not by her contract of sale be put in the control of any other person, and there was nothing in her relation to them that she could convey. The case is not like those in which there is a sale of fixed property, and a local business to which the name belongs, and whose principal features remain unchanged after the sale. If the use by the plaintiff of the name "Fadette Ladies' Orchestra" would have any influence beneficial to herself upon the public who wished to procure the services of such an organization, it would be only to mislead and defraud them by implying that she and such musicians as she employed were the same persons who had formerly gained a good reputation under this name. It is well settled that the courts will not enforce a claim of this kind which contains a misrepresentation to the public. *Hoxie* v. *Chaney*, 143

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Mass. 592. *Connell* v. *Reed*, 128 Mass. 477. *Chadwick* v. *Covell*, 151 Mass. 190, 194. *Weener* v. *Brayton*, 152 Mass. 101. *Covell* v. *Chadwick*, 153 Mass. 263, 267. *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218. *Decree affirmed.*

LATHROP, J. I am unable to agree to the opinion of the majority of the court. It proceeds upon the ground that the name adopted by Ethel Atwood for the orchestra organized by her was not assignable, for the reason that it was personal to herself, and depended upon her personal reputation and skill. The court below has found that the success of the orchestra "was due to the ability, skill, and personal supervision of said Atwood." It follows, then, if the decision of the majority of the court is correct, that if a business is conducted under a trade name, the more the ability, skill, and personal supervision of the owner of the business conduces to its success, the less is the trade name assignable with the business. I think that this is not in accordance with sound principles, or with the authorities.

The opinion of the majority appears to be founded upon a view of the law which is sound within certain limitations, namely, that, where the trademark is the name of the proprietor of the business, it cannot be sold apart from the business, on the ground that it means to the public that the personal skill of a particular individual is exercised in the manufacture or selection of the goods upon which it is used. So far as the cases cited in the opinion of the majority seem to me to have any pertinency they are of this class. But this doctrine has no application where the name is sold with the business. *Kidd* v. *Johnson*, 100 U. S. 617. *Sohier* v. *Johnson*, 111 Mass. 238. *Warren* v. *Warren Thread Co.* 134 Mass. 247. *Russia Cement Co.* v. *LePage*, 147 Mass. 206. *H. A. Williams Manuf. Co.* v. *Noera*, 158 Mass. 110. *Dant* v. *Head*, 90 Ky. 255. *Morgan* v. *Rogers*, 26 Pat. Off. Gaz. 1113. *Oakes* v. *Tonsmierre*, 49 Fed. Rep. 447. *Carmichel* v. *Latimer*, 11 R. I. 395. *Hall* v. *Barrows*, 4 DeG., J. & S. 150. *Bury* v. *Bedford*, 4 DeG., J. & S. 352.

In *Booth* v. *Jarrett*, 52 How. Pr. 169, Edwin Booth mortgaged and leased the theatre built by him in New York, and which, when it was built, he called Booth's Theatre. He afterwards sought to restrain the lessee from the use of the name, on the

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ground that the public would be misled into believing that he was still the manager and acted there. But the injunction was refused; and it was held that the name passed by the lease.

So the name of a hotel is assignable. *Wood* v. *Sands*, Cox's Manual, No. 467. Names of hotels have also been frequently protected. See cases cited in Cox's Manual, No. 108, and note. So names of newspapers. Cox's Manual, No. 10, and note, and No. 174.

In the case at bar I see no reason why the plaintiff was not entitled to have the trade name of the orchestra protected. Such a name is clearly, to my mind, assignable. It also seems to me that the defendants, being merely employees of the plaintiff, and of her predecessor in title, could not, by leaving, acquire the right to use the name under which they had before performed, or any name so similar as to deceive the public.

It is not a case concerning the right of the majority of an association to the name, for here the name was invented by Atwood, and the defendants were hired by her.

The Boston Symphony Orchestra owes its fame to the efforts of its various leaders. If this name is a trade name, it is assignable. Could it be held that members of the orchestra who chose to leave could associate themselves together and perform under this name without being liable to be restrained by injunction?

DORCAS L. SIMONDS *vs.* SUSAN H. SIMONDS & others.

Suffolk. January 22, 1897. — March 5, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Remainder in Fee — Will — Partition of Real Estate — Joint Tenancy.

A testator by will separated his homestead from the rest of his real estate, and gave his widow and unmarried daughter the use and improvement of it while they remained unmarried, the provision concluding "the use of said house and personal property to be shared equally by them, they paying the taxes and insurance thereon and keeping the same in repair, and at the decease of my said wife, I give the same to my two daughters and the survivor of them." *Held*, that the daughters took a remainder in fee as joint tenants.

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PETITION to the Superior Court, for partition of land in Boston. Trial without a jury, before *Sheldon*, J., who ruled that the petitioner was entitled to partition as prayed for, and reported the case for the determination of this court. If the ruling was right, judgment was to be entered in accordance with the finding; otherwise, such judgment as justice might require. The facts appear in the opinion. The Massachusetts Society for the Prevention of Cruelty to Animals had previously intervened conformably to the provisions of Pub. Sts. c. 178, § 14.

G. Cunningham, for the intervening respondent, and as guardian *ad litem* for the possible issue of Dorcas L. and Susan H. Simonds.

T. Hunt, for the petitioner.

KNOWLTON, J. This case presents a single question in regard to the construction of the will of David W. Simonds. He left a widow, who has since deceased, and two daughters, one of whom was married and the other unmarried. In the first part of the second article of the will he left all his household furniture and property intended for use in housekeeping to his wife and his two daughters, "in trust for the benefit of my wife Louisa A. Simonds and my daughter Susan H. Simonds as long as they remain unmarried; and in case my wife should again marry or die, I give them to my said daughters for their own use." There is no doubt that this makes an absolute disposition of this part of his property, the testator's obvious purpose being to secure to his wife and unmarried daughter the use of it jointly in their home so long as they should both remain unmarried, and on the death or marriage of the widow, whether the unmarried daughter had then married or not, to give it to his two daughters in equal shares.

In the same article of the will he separates his homestead from the rest of his real estate, and gives his widow and unmarried daughter the use and improvement of it while they remain unmarried. His provision in regard to it closes as follows: "the use of said house and personal property to be shared equally by them, they paying the taxes and insurance thereon and keeping the same in repair, and at the decease of my said wife, I give the same to my two daughters and the survivor of them." By the Pub. Sts. c. 127, § 24, it is provided that "every devise shall be

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construed to convey all the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate." Even under a will made before this statute was passed it was held that, "where land is devised to one for life, and over to another, especially to a son, without words of limitation, or any further words to express his intent, such a devise over is construed to be a fee." *Plimpton* v. *Plimpton*, 12 Cush. 458, 463. The words "the same" in the clause "paying the taxes and insurance thereon and keeping the same in repair," plainly refer to the homestead and the personal property mentioned above, and they have the same meaning in the clause, "I give the same to my two daughters and the survivor of them."

The language of the fourth article has no tendency to show that the remainder to the daughters after the life estate gives them less than a fee. It refers only to the rest and residue of the estate, and does not purport to include the homestead. The words "whole of my estate" in the last part of this article refer to "the said estate" mentioned in the first part of the article, and are used in contradistinction from the words "her share" which are twice used earlier in the same sentence.*

We find nothing in the will to control the natural presumption from the language, that the petitioner and the respondent took a remainder in fee as joint tenants.

Judgment in accordance with the finding.

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* The fourth article gave the rest and residue "to my said daughters Dorcas L. and Susan H., in trust . . . to keep the said estate securely invested, . . . the net income to be disposed of as follows: one third part thereof to my said wife, one third part thereof to my said daughter Dorcas, and one third part to my said daughter Susan." In the event of the widow's marriage or death, "said income is to be paid to my two daughters, and at the decease of either of my said daughters without issue living, I give her share of said income to the survivor; but if either should die leaving issue living, I give her share of said income to said issue until they severally arrive at the age of twenty-one years, and at the decease of my said wife and both of my said daughters, their issue if any being twenty-one years of age, I give the whole of my estate to the Massachusetts Society for the Prevention of Cruelty to Animals," etc.

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ATTLEBOROUGH SAVINGS BANK *vs.* SECURITY INSURANCE COMPANY.

Bristol. October 26, 1896. — March 6, 1897.

Present: HOLMES, MORTON, LATHROP, & BARKER, JJ.

Fire Insurance — Interest of Mortgagee — Subrogation — Action.

Where the insurance upon property subject to a mortgage is payable in case of loss to the mortgagee "as its interest shall appear," the interest of the mortgagee covered by the policy is that existing at its date, and not under subsequent mortgages in force at the date of the loss.

If the mortgagee of property, to whom a policy of insurance thereon is made payable in case of loss as his interest shall appear, has become unable, by his own act, to comply with the terms of the provision in the policy for subrogation, he cannot maintain an action on the policy.

CONTRACT, upon a policy of insurance against loss by fire on certain property in South Wrentham. Trial in the Superior Court, without a jury, before *Hopkins*, J., who found for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. If, upon all the facts, the plaintiff was entitled to judgment, such judgment was to be entered in the sum of $2,000; otherwise, judgment was to be entered upon the finding. The facts appear in the opinion.

J. M. Lesser, for the plaintiff.

C. W. Clifford & O. Prescott, Jr., for the defendant.

LATHROP, J. This is an action on a policy of insurance against loss by fire, in the Massachusetts standard form, issued to Emma A. Briggs, and "payable in case of loss to Attleborough Savings Bank, mortgagee, as its interest shall appear." Among other things the policy provides that it shall be void if, without the assent of the company the property shall be sold; and further, that, "if this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided that the mortgagee shall, on demand, pay according to the established scale of rates

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for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself or with others to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the company interested, upon such payment, the said mortgage, together with the note and debt thereby secured."

When the policy was issued the plaintiff held a mortgage on the property insured for $1,500. At the date of the loss there was due on the mortgage $1,500, the interest having been paid. After the policy was issued the plaintiff took a second and a third mortgage on the property from the same owner, for $1,000 and $500 respectively. The defendant had no notice of these subsequent mortgages until after the loss. At the time of the loss there was due on all three mortgages an amount exceeding $2,000. Before the loss the owner of the property sold it without notice to the defendant, the deed reciting that the premises conveyed were subject to three mortgages to the Attleborough Savings Bank. On December 28, 1894, the plaintiff, without notice to the defendant, released from all three mortgages a part of the mortgaged property. On January 8, 1895, the defendant tendered to the plaintiff the sum of $1,500, and demanded an assignment of the first mortgage and the note for $1,500 which it secured. The plaintiff rejected the tender.

The mortgagor having forfeited her insurance by a conveyance without notice to or the consent of the defendant, the question is as to the plaintiff's rights under the policy. The plaintiff contends that, as at the time of the loss it held three mortgages on the property greater in amount than the sum insured, it is entitled to recover $2,000, which is the amount of the policy. The defendant contends that the interest of the plaintiff was insured only to the amount due at the time of the loss under the first mortgage, and that the plaintiff, having refused to assign said mortgage and mortgage note, and having put it out of its power to subrogate the defendant to its rights under the first mortgage, can recover nothing.

We are of opinion that the defendant's contention is correct. The chief reliance of the plaintiff in its argument is on the lan-

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guage of the clause by which the policy is made payable to the plaintiff. But the words "as its interest shall appear" have reference to the amount which may be due the mortgagee on the mortgage debt, which is originally brought to the attention of the insurer. It was not intended to include additional claims, but was intended to provide for a diminution of the interest of the mortgagee by the reduction, by payment or otherwise, of the amount of the debt.

In *Palmer Savings Bank* v. *Ins. Co. of North America*, 166 Mass. 189, while the question now before the court was not determined, the law in relation to policies insuring the interest of a mortgagee was much considered. It is there said that at first the policy was usually issued to the mortgagor in the common form, and was then assigned to the mortgagee to the extent of his interest, the insurance company assenting to the assignment; that afterwards the provisions for the benefit of the mortgagee were inserted in the body of the policy, but that such policies, unless there were stipulations to the contrary, were avoided as against the mortgagee by any act of the mortgagor which avoided the policy as to him, and that the present form was adopted in order to give the mortgagee a better security, but that the effect was the same as if the mortgagor had taken out the insurance in his own name and then assigned it to the mortgagee to the extent of his interest, and the insurance company had assented to the assignment and had promised the mortgagee that no act of the mortgagor should defeat the right of the mortgagee to recover to the extent of his interest. But whether the clause is to be considered as an assignment by the mortgagor of an insurance upon his interest, or as a contract made with the insured by which, in a certain contingency, it promises to pay to the mortgagee an amount to be determined, it seems to us clear that the nature of the interest and the extent of the risk must be made known at the time when the contract is made, in order that the premium may be measured thereby. While the insurance company cannot be compelled to pay more than the face of the policy, yet to obtain the advantages of subrogation, if the plaintiff's contention is correct, it may be compelled to pay several times that amount. The clause in regard to subrogation is inserted as of value to the company, and must be taken into con-

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sideration in measuring the risk assumed and the consideration paid therefor; but if this amount cannot be determined when the contract is made, and may be so great as to make the subrogation clause worthless, it ceases to be one of the elements of the contract.

We are therefore of opinion that the plaintiff's interest under the subsequent mortgages was not covered by the insurance; and that as it was not willing to assign its first mortgage and note, and in fact could not do so, the justice who tried the case in the court below rightly found for the defendant.

According to the terms of the report, the order must be,

Judgment for the defendant.

MAX GORDON & another *vs.* ISAAC ALBERT.

Suffolk. January 20, 1897. — March 6, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Partnership — Release of Debt by one Partner — Action — Bar.

A release by one partner of a debt due to the firm, after the debtor has notice of the dissolution of the firm and has been notified also that any settlement must be made with both partners together, is a bar to an action by both to recover the debt.

CONTRACT, by Max Gordon and Hyman Cohen, copartners under the firm name of M. Gordon and H. Cohen, upon an account annexed, to recover $221 for labor and materials. Writ dated October 9, 1895. The answer, among other defences, set up a release of the cause of action obtained from the plaintiff Cohen while the action was pending. Trial in the Superior Court, before *Sheldon*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiffs put in evidence the report of an auditor, to whom the case had been referred, of which the following are the material portions.

On August 22, 1895, the plaintiffs entered into a contract with the defendant to make certain alterations and repairs in a brick

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dwelling-house owned by him. The plaintiffs were at that time copartners, and the contract was in fact executed in behalf of the firm, and was signed by both as a firm contract. The price agreed upon for the work to be done under the contract was $150.

On August 26, 1895, the plaintiffs began work in performance of the contract. They continued at work upon the building continuously until and including September 17. During that time they did a great deal of work not specified or called for in the written agreement. A principal question between the parties related to this additional work. The defendant contended that the plaintiffs agreed to do this extra work for the sum of $50 in addition to the original contract price, making $200 in all.

The auditor found that all work done by the plaintiffs and not mentioned in the contract of August 22 was extra work; that a part of this work the plaintiffs agreed to perform for $50; that for the other items they were entitled to recover a fair price; and that the prices charged by the plaintiffs in their account annexed were reasonable prices, subject to a deduction for unfinished and improper work.

The plaintiffs ceased to work on September 17, 1895; on that date they demanded payment from the defendant, who advanced a small sum, and they immediately placed the matter in the hands of an attorney, who made a further demand upon the defendant on September 18. The defendant contended at the hearing that the plaintiffs were not entitled to recover anything, because the work was abandoned in an unfinished condition, and also because mechanics' liens were claimed by certain workmen of the plaintiffs upon the building.

"In respect to the condition of the work, I find that on said September 17 there was a substantial performance by the plaintiffs of all work ordered by the defendant, whether under the contract or as extras, and the plaintiffs were entitled to compensation. There were some items of work left in an unfinished condition, or improperly done, and for these a deduction should be made. No satisfactory testimony was produced as to what would be a fair deduction for each item so left unfinished, but relying principally upon the estimate of a contractor called by

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the defendant, I find that $60 would be a fair price to complete all unfinished work and put the whole job in a reasonably good condition.

"I annex a statement of the account between the parties, and I find, as shown in said account, that there was due to the plaintiffs from the defendant at the date of the writ the sum of one hundred and fifty-six (156) dollars with interest thereon from September 17th, 1895."

The release set up in this answer was put in evidence, and read as follows:

"Boston, Mass., Feb. 18th, 1896.

"I, Hyman Cohen, of the firm of M. Gordon and H. Cohen, carpenters and builders, of the said city and Commonwealth, upon consideration of the sum of $27.50, do hereby release and discharge all the claims entered against Mr. Albert of Chelsea, Mass., and the said amount is received in full payment and settlement up to date, to our firm.

"H. Cohen.
M. Gordon. [Seal.]"

The release was executed on the day of its date by the plaintiff Cohen, in the absence of Gordon, and without Gordon's knowledge. Cohen received for the release a check for $27.50, payable to the order of M. Gordon and H. Cohen, which he indorsed and thereupon collected the money.

The defendant, at the time of the execution of the release, and as part consideration therefor, executed a similar release of all his claims against the firm, and at that time he had an action pending against the firm. The copartnership between Gordon and Cohen, which had existed but a short time prior to the contract with the defendant, was dissolved immediately after the work upon his house was completed. There has been no general settlement or accounting between the partners, and there was no agreement between them that either one should wind up the business, or should have control of the claim or suit against the defendant. There were disputes existing between them prior to the date of the release in regard to the partnership affairs, and Cohen kept the $27.50 under a claim that it rightly belonged to him.

At the date of the release the defendant knew that the part-

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nership between the plaintiffs had been dissolved, and Gordon had given him notice that any settlement must be made with both partners together. He also knew that the settlement with Cohen was more favorable than he was likely to obtain from Gordon, but he acted for his own interest, and in the belief that he had a legal right to deal with Cohen, and that the release executed by Cohen would discharge him as against Gordon also.

"I find and report, in so far as the question is a question of fact, that the release is a bar to this action against both plaintiffs, and in consequence there is nothing due to the plaintiffs from the defendant.

"If, however, the court shall be of opinion that, upon the foregoing facts, the release is inoperative, the plaintiffs are entitled to judgment, but the defendant is entitled to an additional credit of $27.50, the amount paid to the plaintiff Cohen for the release. Allowing this credit, the amount due to the plaintiffs is $128.50, with interest from September 17, 1895."

Thereupon it was agreed by the parties that the following sentence in the auditor's report, "I find and report, in so far as the question is a question of fact, that the release is a bar to this action against both plaintiffs, and in consequence there is nothing due to the plaintiffs from the defendant," was merely a conclusion of law from facts previously found and stated in the auditor's report.

The plaintiffs claimed the right to go to the jury, but the judge directed the jury to return a verdict for the defendant; and the plaintiffs alleged exceptions.

L. N. Bennett, for the plaintiffs.

A. T. Johnson, for the defendant.

HOLMES, J. The only question before us is with regard to the effect of a release of a debt due to his firm by one partner after the debtor has notice of dissolution, and has been notified also that any settlement must be made with both partners together. The question hardly can be considered open under our decisions. Whatever the want of authority of one partner to represent the other under such circumstances, if he has an interest he cannot be hindered from releasing his own claim, as might be the case if he had sold out to his former associate and were a mere trustee. His right to release his own interest is

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absolute, whatever his motive. A release disables him from maintaining an action, and the other cannot sue without him. *Homer* v. *Wood*, 11 Cush. 62. *Eastman* v. *Wright*, 6 Pick. 316, 323. *Farley* v. *Lovell*, 103 Mass. 387. *Grover* v. *Smith*, 165 Mass. 132. See *Phillips* v. *Clagett*, 11 M. & W. 84, 91, 92, 94; *Barker* v. *Richardson*, 1 Yo. & Jerv. 362, 366.

It is not necessary to consider whether, if the defendant made the settlement with fraudulent intent, the defrauded plaintiff could have relief in equity. He certainly could have none at law. *Exceptions overruled.*

NEW ENGLAND AWL AND NEEDLE COMPANY *vs.* MARLBOROUGH AWL AND NEEDLE COMPANY.

Suffolk. January 28, 1897. — March 6, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Infringement — Imitation of Goods — Equity.

A., a manufacturer, put up awls in a distinctive package consisting of a bronze colored box having a brown label on the top and one side with printed inscriptions, and tied with an orange string. Ten years after A. began the use of this package, which use, though small at first, increased largely during the last two years, B., a manufacturer of awls, began to use a box indistinguishable in every particular, even to the words of the inscription and the size and shape of the type, except that at the bottom, in letters and arrangement as nearly like A.'s as possible, instead of "Manufactured and warranted by New England Awl and Needle Co.," in a certain town, the label read, "Manufactured for United States Awl and Needle Co.," in a certain city. *Held*, that A. could maintain a bill in equity to restrain B.'s acts.

BILL IN EQUITY, filed in the Superior Court on September 12, 1896, to restrain the infringement of an alleged exclusive right to use a certain package for the plaintiff's goods. Hearing before *Sheldon*, J., who ruled that the plaintiff was not entitled to the relief asked, and ordered the bill to be dismissed; and the plaintiff appealed to this court. The facts appear in the opinion.

J. E. Maynadier & O. R. Mitchell, for the plaintiff.

W. H. Coolidge & H. N. Rice, for the defendant.

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HOLMES, J. This is a bill to restrain the infringement of an alleged exclusive right of the plaintiff to put up awls in a distinctive package consisting of a bronze colored box having a brown label on the top and one side with printed inscriptions, and tied with an orange string. The box used by the defendant is indistinguishable in every particular, including the words of the inscription and the size and shape of the type, except that at the bottom, instead of "Manufactured and Warranted by the New England Awl & Needle Co., West Medway, Mass.," the defendant's label reads, "Manufactured for the United States Awl & Needle Co., New York," in letters and arrangement as nearly like the plaintiff's as possible. It is admitted by the answer that the plaintiff is a manufacturer of awls, and that it has used packages of the kind described since 1885. At first this use was comparatively small, but in 1893 it increased, and in 1896 extended to three quarters of the plaintiff's manufacture. In September, 1895, the defendant began the use complained of. An inspection of the boxes makes it plain that the public would not distinguish them. The judge before whom the case was tried found the facts, and ruled that the bill could not be maintained.

It is found that the defendant did not intend to deceive the public by passing off their goods for the plaintiff's, but this must be taken pretty strictly. They knew that they were putting the power to do so into the retail dealers' hands. It hardly can be doubted that they contemplated that the wholesale dealer at whose request they put up their awls in this form, with full knowledge of the plaintiff's prior use, would or might try to deceive the public, and whether they did or not is immaterial. They knew it after they were warned by the plaintiff, and stood upon their rights. The principles upon which the rights of the parties are to be determined are similar to those which are well known to govern trademarks, although the combination of elements is more complex than in devices which commonly go by that name. *Hildreth* v. *D. S. McDonald Co.* 164 Mass. 16. *Chadwick* v. *Covell*, 151 Mass. 190, 194. *Goodyear's India Rubber Glove Manuf. Co.* v. *Goodyear Rubber Co.* 128 U. S. 598, 604. *McLean* v. *Fleming*, 96 U. S. 245, 253, 254. *Taendstieksfabriks Aktiebolagat Vulcan* v. *Myers*, 139 N. Y. 364. *Hall* v. *Barrows*,

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4 DeG., J. & S. 150, 159. *Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376, 389. *Turton* v. *Turton*, 42 Ch. D. 128, 141. Kerly, Trade Marks, 13–15.

The report states that it did not appear whether or not any purchaser of awls had learned to recognize the plaintiff's awls by the appearance of the packages. This cannot mean more than that there was no direct testimony to that effect. But the fact that the plaintiff had used the combination since 1885, and largely since 1893, is enough to raise a presumption in its favor. *McAndrew* v. *Bassett*, 4 DeG., J. & S. 380, 384, 385.

The ground of the ruling probably was that the plaintiff did not claim a trade mark in boxes or labels, and that its objection to the defendant's boxes was solely because the label was of the same color as the plaintiff's. Of course a person cannot claim the monopoly of a color in connection with a particular line of trade, and very likely not in connection with the labels of a certain kind of goods generally. But the most universal element may be appropriated as the specific mark of a plaintiff's goods if it is used and claimed only in connection with a sufficiently complex combination of other things. The plaintiff did not claim the exclusive right to brown labels for awls, but it claimed the exclusive use of the brown color in the combination which we have described. If the only other element besides the color had been a box of a certain size and a label of a certain shape, the case might be different; *Enoch Morgan's Sons Co.* v. *Troxell*, 89 N. Y. 292; but when there is added an inscription, which both in its pictorial aspect of black marks and in its meaning was calculated to confuse if not to deceive, the plaintiff's claim seems to us moderate. *Frese* v. *Bachof*, 14 Blatchf. 432. *Sawyer* v. *Horn*, 4 Hughes, 239, 253; *S. C.* 1 Fed. Rep. 24. *Carbolic Soap Co.* v. *Thompson*, 25 Fed. Rep. 625. *Jennings* v. *Johnson*, 37 Fed. Rep. 364. *Wellman & Dwire Tobacco Co.* v. *Ware Tobacco Works*, 46 Fed. Rep. 289. *N. K. Fairbanks Co.* v. *R. W. Bell Manuf. Co.* 77 Fed. Rep. 869.

We are of opinion that the plaintiff is entitled to an injunction. To what further relief it is entitled can be determined better by the Superior Court.

Injunction to issue.

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CALVIN S. CROWELL *vs.* CAPE COD SHIP CANAL COMPANY & another.

Barnstable. January 29, 1897. — March 9, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Cape Cod Ship Canal Co. — Fund for Payment of Claims — Statute — "Labor performed in Construction of Canal" — Allowance of Claims.

The provision of St. 1883, c. 259, § 19, requiring the Cape Cod Ship Canal Company to deposit a certain fund with the Treasurer of the Commonwealth as security for the payment, among other things, of "claims for labor performed or furnished in the construction of said canal," does not include the official services of the president and clerk of the corporation, or the services of the chief engineer, or of the clerk in his office, or of the assistant engineer, in locating the canal and in making computations or surveys afterwards.

A claim for land damages, which has not been seasonably prosecuted and is barred by the special statute of limitations, cannot be allowed in a suit in equity to apply, to claims which it was intended to secure, the deposit required by St. 1883, c. 259, § 19, to be made by the Cape Cod Ship Canal Company with the Treasurer of the Commonwealth; nor can a claim founded on services rendered to earlier companies be allowed in such suit.

BILL IN EQUITY, against the Cape Cod Ship Canal Company and the Treasurer of the Commonwealth, brought originally to have a judgment for land damages obtained by the plaintiff against the corporation paid out of a fund of $200,000 deposited by the corporation with the aforesaid treasurer, as required by St. 1883, c. 259. After the former decision, reported 164 Mass. 235, remanding the case to the county court that an order of notice might issue to all parties interested in the fund to present their claims within a time limited, the case came on to be heard for the proof of such claims before *Holmes*, J., who reported it for the consideration of the full court, in substance as follows.

The claims were of several classes, and the questions of law with regard to them are stated below.

(1.) Land damages. These claims, so far as they have passed to award or judgment, were not disputed.

(2.) A claim which had not been prosecuted, and proceedings to establish which in the regular way were barred, was presented on behalf of one Andrew F. Perry. The judge declined to try

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this claim in this cause. The question whether it ought to be tried here was reported to the full court.

(3.) Claims of various employees.

(a.) William Seward, Jr. This is a claim for salary as president of the defendant corporation from June, 1884, to June, 1894, at five hundred dollars per annum. He was elected president by the directors at their first meeting after organization, on July 6, 1883.

On October 8, 1883, a contract for the building of the canal was made with one Frederick A. Lockwood, whereby he was to build the canal according to the specifications, and was to receive therefor the sum of $7,500,000, payable in monthly instalments at the rate of one million dollars per mile of completed canal, according to the length of the canal completed during the month. The third section of this contract was as follows: "3. For the purpose of meeting its payments under this contract, the said company shall from time to time, as required, issue capital stock to the full amount authorized by its charter. Said stock shall be subscribed for by said contractor and the amounts due from the company under the contract shall be offset against the amounts due from said contractor on account of his subscription to said capital stock."

On October 19, 1883, the by-laws of the corporation were amended by striking out the provision that "the directors must be stockholders," and on the same day Lockwood made the following subscription to the capital stock of the corporation. "I hereby subscribe for fifty thousand (50,000) shares of the capital stock of the Cape Cod Ship Canal Company, agreeing to pay therefor the sum of one hundred dollars ($100) per share as per terms of contract. Frederick A. Lockwood."

The directors of the corporation at a regularly called meeting passed a vote cancelling and annulling all subscriptions previously made to the capital stock, and also passed the following vote: "Voted, That each share of the capital stock of this company be assessed fifty cents (50 c.), and that Frederick A. Lockwood, subscriber therefor, be directed to pay the same (being $25,000) to the treasurer, on or before the 25th day of October." Accordingly Lockwood paid the assessment of $25,000 and began the construction of the canal, expending large amounts of money thereon. No certificate of stock was ever issued to him.

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On May 8, 1884, at a meeting of the stockholders of the corporation, at which the president, William Seward, the treasurer, Samuel Fessenden, and Frederick A. Lockwood were present, Lockwood presented his subscription above set forth to the president as his credentials as a stockholder. The president "decided and declared that no meeting of the stockholders of the Cape Cod Ship Canal Company can be held." Lockwood said, "The stockholders are present and insist on their rights without any waiver whatever," and moved that the meeting be adjourned to May 29, at noon, and, on the president declining to entertain the motion, put the motion himself, and declared it carried unanimously. After several adjournments at meetings where Lockwood was present and voted as the sole stockholder representing the whole fifty thousand shares, and at which Seward was not present, at an adjourned meeting held on July 10, 1884, at which Seward was not present and at which Lockwood was present as representing the whole fifty thousand shares, a new board of directors omitting Seward was elected by ballot; and on the same day, the directors chosen at that meeting met and elected a new president of the corporation; and from July 10, Seward performed no further actual service as president of the corporation and attended no meetings, although there were frequent meetings of stockholders and directors, and the directors elected as above set forth and at subsequent meetings acted as directors and the president chosen by them acted as such until the corporation ceased to act in December, 1890.

At a meeting of the directors held on November 3, 1883, a committee was appointed with full powers to fix the salaries of the officers of the company at such amounts as the committee and Lockwood should agree upon.

On January 26, 1884, the committee made the following report: "Samuel Fessenden, Esq., Treas. Cape Cod Ship Canal Co. Dear Sir: The committee appointed at the last meeting of the board of directors to fix the salaries of the officers of the company have attended to their duty and have agreed with F. A. Lockwood upon the following salaries for the current corporation year, beginning at the organization of the corporation in July, 1883, and ending on the second Thursday of May, 1884. President, $500; Treasurer, $500; Clerk, $500; Chief Engineer,

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$3000; Counsel, $3000. Yours truly, George S. Hall, Chairman." "I assent to the above salaries. F. A. Lockwood."

An agreement with the company was made by Seward and other officers of the company, which was signed by each, and was as follows: "Resolved, that all officers, employees, and agents of this company be employed with the understanding between them and the company, that no pay is to be received for their services unless and until there shall come into the treasury of the company sufficient money to pay the amount which shall be voted by the board of directors for their compensation, and that all officers and agents of the company sign and assent to this resolution before entering upon their duties."

From and after December 8, 1888, there was no money in the treasury of the corporation, unless this fund of $200,000 deposited with the Treasurer of the Commonwealth be so considered.

No meetings of the corporation or of the directors were held and nothing was done by the corporation after December 5, 1890.

The judge reserved for the full court the questions whether Seward was president after the election of June, 1884; whether, if he was president, he was entitled to salary as such; and whether such salary is a claim for labor within the charter so as to be a charge upon the fund of $200,000.

(b.) Willard Howland, clerk. It appeared by undisputed testimony that Mr. Howland had served as clerk of the corporation until December 5, 1890, at a salary of $500 a year, and that $1000 of this salary remained unpaid. He signed the agreement above set forth. The questions of the effect of this agreement and whether his claim is a claim for labor within the charter, St. 1883, c. 259, § 19, were reserved for the full court. Subject to them his claim was allowed.

(d.) P. E. Nostrand. He had a claim for services as against earlier companies, and suggested that in some way this company was subject to their obligations. The judge excluded this claim, and reported the question.

(e.) George H. Titcomb. He was chief engineer of the company from June 10, 1883, until April 25, 1888. He has a judgment, dated October 16, 1896, against the corporation for $16,350.71 and costs, for his salary during the above time. The judge reserved for the full court the question whether services

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as chief engineer are labor within the charter. If they are labor within the charter, but if mere occupation of the office sufficient to entitle him to his salary but not contributing to the construction of the canal is not labor within the statute, then, subject to the question of competency, the judge found that he did not do labor at all approaching in value the amount of the judgment, and his claim was to stand for hearing on the question what the labor actually done by him fairly was worth, or on such other form of question as shall seem proper to the court in order to determine the amount of his charge against the fund.

(f.) George W. Wright. He was assistant engineer and has a judgment dated December 2, 1895, for $1580.65. His case raises the same question as Titcomb's claim.

(g.) John Donovan. He was a clerk of Titcomb. The company denies that it had any contract with or obligation to him. A suit is pending in the Superior Court, but as it would be a useless expense to try the case unless, if he gets a judgment, he can come against this fund, in order to save expense and in view of the fact that the court will be called on to deal with the questions, the judge ruled *pro forma* that his services were not labor within the meaning of the charter, and that, if they were, so much of the salary as did not represent actual labor was not a charge upon the fund, dismissed his claim on those grounds, and reported the question to the full court.

Thomas L. Livermore files a petition as creditor, and it is not disputed that he is entitled to the residue of the fund, if any there is, after the satisfaction of all claims which are a lien upon the fund.

G. Putnam, for Livermore.

S. K. Hamilton, for Wright, submitted the case on a brief.

W. M. Payson, for Titcomb.

G. P. Wardner, for Donovan.

KNOWLTON, J. The Cape Cod Ship Canal Company was incorporated by the St. of 1883, c. 259, and by § 19 of that chapter was required to deposit two hundred thousand dollars with the Treasurer of the Commonwealth as security for the faithful performance of the obligations imposed by the act, "and for the payment of all damages occasioned by the laying out, construc-

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tion, and maintenance of said canal, or by taking any land or materials therefor, and also of all claims for labor performed or furnished in the construction of said canal." This is a suit in equity to apply the deposit to the payment of claims which it was intended to secure, and the principal question in the case is what is meant by the words "claims for labor performed or furnished in the construction of said canal." We have been referred to a great many cases in different jurisdictions in which the words "labor" and "laborer," used in different connections in a great variety of statutes, have been considered and interpreted by the courts. We can derive little aid from these cases, for the words "labor" and "construction" are simple words in common use, and the difficulty in this case is to ascertain the intention of the Legislature in passing a statute which, in important features, is unlike any other of which we have knowledge.

In this same section there is a requirement that said "corporation shall, within four months from the passage of this act, pay to the Commonwealth and to the town of Sandwich all sums of money expended by them, or either of them, in the support and removal from the Commonwealth of any persons who were engaged in the construction of said canal in the year eighteen hundred and eighty." Here is a reference to the fact that a previous attempt to construct a canal across Cape Cod had failed, and had left persons who were engaged in the construction in necessitous circumstances, which called for the expenditure of money by the town of Sandwich and the Commonwealth in their support or removal. "The faithful performance of the obligations imposed by this act," which the deposit of money was to secure, does not include the payment of ordinary debts. Payment is secured for holders of only two classes of claims; first, those for land and materials taken for the canal; and, secondly, those for labor performed or furnished in the construction of it. It is evident that there are reasons which moved the Legislature to prefer these classes of claims. In regard to land and materials, the owners would be obliged to give up what was taken under the right of eminent domain, and the State could not justly authorize the taking without making perfect provision for their security. In regard to the men engaged in manual labor in the

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construction of the canal, it was important that their pay should be secured to them, to protect the town and Commonwealth from the risk of having to support them as paupers, as well as for their own sake. As some of these laborers would not contract directly with the corporation, it was important that the contractors who furnished labor should be paid, as in that way there would be a probability that, having the means to do it, they would pay the laborers. The obvious purpose of the provision is to protect two classes of creditors having special need of protection.

The persons before us, whose claims depend on the decision of this question, are the president and clerk of the corporation, the chief engineer, the assistant engineer, and a clerk of the chief engineer. All of them except the clerk of the chief engineer held official, or semi-official, positions in the corporation, and rendered services in promoting the enterprise, for which they were to be paid regular salaries. If the clerk of the chief engineer has any legal claim against the corporation, it is for a salary; but whether he had any contract with the corporation is in dispute. It is too plain for discussion that the official services of the president and clerk of the corporation are not labor performed in the construction of the canal within the meaning of the statute. The chief engineer and the assistant engineer have obtained judgment in the Superior Court against the corporation for amounts founded on established salaries, and it is found in the hearing of this case that the services rendered were much less in value than the amounts of the salaries for which judgments were rendered. Presumably an important part of the services rendered in the engineering department were in locating the canal before beginning the work of construction. The above quoted section of the statute makes a distinction between locating and constructing in the provision that "said canal company may locate, but shall not begin to construct said canal," before making the deposit of two hundred thousand dollars. A great many statutes have been enacted in this Commonwealth in reference to labor and laborers, and in most, if not all of them, the legislation has not had reference to persons engaged in the learned professions or in educational or scientific pursuits. Looking to the different provisions of the statute before us, we are of opinion that the labor performed in the construction of the

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canal, for which this security was given, was not intended to include the services of the chief engineer, or of the clerk in his office, or of the assistant engineer, in locating the canal and in making computations or surveys afterwards.

The claim of Andrew F. Perry for land damages, which was not seasonably prosecuted and was barred by the statute of limitations, cannot be allowed in this suit.

The claim of Nostrand, founded on services rendered to other companies, has not been pressed and cannot be allowed.

The result is that all the disputed claims are disallowed, and, after payment of the undisputed claims for land damages, the balance is to be paid to Thomas L. Livermore.

So ordered.

MARGARET T. BROOKS *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. January 19, 1897. — March 17, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Railroad — Runaway Horse on Platform of Station — Action — Negligence — Evidence.

If, while a person is waiting upon the platform of a railroad station to take a train for which he has a ticket, a runaway horse comes along a public street which crosses the railroad at grade close by the station and has gates lowered on each side of the track, the train having just come in, and breaks through the first gate, stops a little at the second, turns towards the station, passes between the locomotive engine and a telegraph post, a space not over four feet in width, and comes upon the platform, throwing down and injuring the person, he cannot maintain an action against the railroad corporation for his injury. The failure of the gate-tenders to catch hold of and stop the horse is not evidence of negligence which is entitled to be considered; and evidence of the condition of the gate at the time of the accident, or several months earlier, when a horse, not a runaway, was alleged to have pushed it aside by pressing against it, is immaterial.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. Trial in the Superior Court, before *Fessenden*, J., who ruled that the plaintiff was not entitled to recover, and directed the jury to return a verdict for

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the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

C. W. Bartlett & H. F. Naphen, for the plaintiff.

C. F. Choate, Jr., for the defendant.

ALLEN, J. The plaintiff was standing upon the platform of the defendant's railroad station, at the Roxbury crossing, in Boston, waiting to take a train, for which she had a ticket. It is not in controversy that she is to be regarded as a passenger. A much travelled public street, Tremont Street, crossed the railroad at grade, close by the station. Gates were down on each side of the track, as the train had just come in. A runaway horse came along the street, broke through the first gate, stopped a little at the second, turned towards the station, passed between the locomotive engine and a telegraph post, a space not over four feet in width, and came upon the platform and threw down and injured the plaintiff. The question is whether, on the evidence, the plaintiff was entitled to go to the jury upon the defendant's negligence.

There is no doubt of the duty of a railroad company to use all such means and precautions as are reasonably practicable for the protection and safety of its passengers, not only from the negligence or misconduct of its own agents and servants, but also of other passengers, and of other persons who are not passengers. This duty is stated in *Simmons* v. *New Bedford, Vineyard, & Nantucket Steamboat Co.* 97 Mass. 361, to require "the utmost care which is consistent with the nature and extent of the business in which he [the carrier of passengers] is engaged . . . in making such reasonable arrangements as a prudent man would make to guard against all dangers, from whatever source arising, which may naturally and according to the usual course of things be expected to occur." (p. 368.) And again, the defendants "were not indeed responsible for the negligent or wrongful acts of the passengers to the same extent as for those of their own officers and crew. But they had the power to make reasonable regulations as to the places which passengers might occupy and as to their conduct while on board. And they were bound to use the utmost skill and care of prudent men in taking precautions to prevent any passenger from being injured by the ignorant, negligent, or reckless acts of other passengers." (p. 369.)

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The test of the defendant's responsibility for this accident is whether the defendant was reasonably bound to anticipate that such a thing might happen, and to take some special precautions against it.

The accident arose from a cause wholly outside of the operations of the defendant. The plaintiff was not in a car, but on the platform. The horse was not in the defendant's care or use, and did not run away in consequence of anything done by the defendant. If the horse had run upon the sidewalk of Tremont Street and hurt persons travelling thereon, nobody would have thought of seeking to hold the city responsible. The rule requiring peculiar care of carriers of passengers is to be applied with reference to the circumstances. When passengers are on board a steamboat or a railroad car, of which the carrier has the exclusive management and control, the duty of the carrier has reference to that state of things. When passengers are on a wharf or landing place, or on the platform of a railroad station, which is usually an open and almost a public place, to which others than passengers and servants of the carrier are accustomed to have free access, the duty of the carrier has reference to that state of things. It is well known that it is not the custom to fence in railroad platforms for passengers at way stations. All through the Commonwealth they are often so arranged as to allow horses with carriages or wagons to come close up to them. It is made easy for passengers and others to come upon or to leave these platforms. Many persons who are not passengers are often found upon them, — hackmen, drivers of private carriages, expressmen, teamsters, and many others. Indeed, this state of things is partly recognized by the statute requiring railroad companies to give equal facilities for the use of their depots and grounds. Pub. Sts. c. 112, § 188. There is always a possibility that horses, as well as other animals, may come upon the platforms; but accidents from this cause are rare. Looking at the matter in the light of experience, of custom, and of statutory requirements, merely arranging a platform of a station in such a manner as to make it possible for horses to come upon it is of itself no evidence of negligence.

Moreover, having special reference to the facts of the present case, it is not to be overlooked that the horse gained access to

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the platform upon which the plaintiff stood only by passing through a space of not over four feet in width, between the locomotive engine and a telegraph pole, this being at the time the only way in which he could reach the platform from the place where he stopped at the second gate. It certainly could not be the duty of the defendant to keep this place closed by a barrier at all times when railroad trains were at rest in front of the station, with a view to guard against the possibility of runaway horses coming along, and breaking through one of the gates which extended across the street. The train itself would effectually bar off all other approach of horses from that direction.

No case has been called to our attention where, under such circumstances, a carrier has been held responsible to one who, though a passenger, was upon the platform or landing place, and was hurt from a cause of this kind, arising entirely outside of the operations of the carrier. In *Smith* v. *Great Eastern Railway*, L. R. 2 C. P. 4, the plaintiff while waiting in the station for a train was bitten by a stray dog, and it was held that there was no evidence for the jury of the defendant's negligence. As to the general duty of carriers, reference may also be made to *Dodge* v. *Boston & Bangor Steamship Co.* 148 Mass. 207; *Moreland* v. *Boston & Providence Railroad*, 141 Mass. 31, *ad finem*; and *Simkin* v. *London & Northwestern Railway*, 21 Q. B. D. 453.

The plaintiff however contends that there was some evidence that the defendant's gate-tenders were negligent in not catching hold of the horse and stopping him. An opportunity to render such a service is so rare, that gate-tenders are not and need not be selected with reference to their fitness to perform it. While it is conceivable that a very quick-witted and active man might have caught hold of the horse as he stopped, the failure of the gate-tenders to do so is such extremely slight evidence of any negligence which could be imputed to the defendant, that the presiding judge was justified in disregarding it altogether. It would not support the burden of proof which rested upon the plaintiff. *Shea* v. *Wellington*, 163 Mass. 364, 372. *Buswell* v. *Fuller*, 156 Mass. 309, 312. *Hillyer* v. *Dickinson*, 154 Mass. 502. *Treat Manuf. Co.* v. *Standard Steel & Iron Co.* 157 U. S. 674. *Herbert* v. *Butler*, 97 U. S. 319. *Commissioners of Marion County* v. *Clark*, 94 U. S. 278, 284. In *Pitts-*

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burgh, Fort Wayne, & Chicago Railway v. *Hinds*, 53 Penn. St. 512, it appeared that, while a general fight was raging in the rear car of a train, the conductor did not stop the train, or call on the other trainmen or passengers to help stop the fight, but busied himself with collecting fares in the forward cars; and this, of course, was held to show negligence on his part for which the company might be held responsible. This does not apply where the emergency was of so short duration as in the case before us. The duty of a carrier to protect passengers from the violence of other passengers is also considered in *Putnam* v. *Broadway & Seventh Avenue Railroad*, 55 N. Y. 108, 114; *Flint* v. *Norwich & New York Transportation Co.* 34 Conn. 554; *New Orleans, St. Louis, & Chicago Railroad* v. *Burke*, 53 Miss. 200; and *Pittsburgh & Connellsville Railroad* v. *Pillow*, 76 Penn. St. 510.

Having reference to the accident which happened to the plaintiff, there was no such close connection between it and the condition of the gate as testified to, either at the time of the accident or at the earlier date at which its condition was sought to be shown, as to make the evidence material.*

For these reasons, the case was rightly withdrawn from the jury.

Exceptions overruled.

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* A witness, who was qualified as an expert, and who had made an examination of the gate, testified that the slots in the posts, in which the pulleys attached to each end of the gate travel, were not deep enough; and that, by a pressure on the centre of the gate, the ends of the gate could be pushed out, leaving the gate unsupported except by the chains on which it hung. The plaintiff also offered to show that, four or five months before the accident, the gate was pushed aside by a horse, not a runaway, pressing against it; but this evidence was excluded.

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BAR ASSOCIATION OF THE CITY OF BOSTON *vs.* ELISHA GREENHOOD.

Suffolk. March 4, 6, 1896. — March 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Disbarment of Attorney — Common Law and Statute — Specifications of Charges — Finding of Guilty of Deceit, Malpractice, and Gross Misconduct in Office.

If the provision of Pub. Sts. c. 159, § 39, relating to the removal from office of an attorney at law, was intended to cover only deceit or misconduct in the performance of his official duties, it does not limit the power of the court, at common law, to remove an attorney from his office, either permanently or temporarily, for crime or other gross misconduct not connected with any official act.

Under Pub. Sts. c. 159, § 39, as well as at common law, the removal of an attorney from office may be absolute, leaving him to apply to the court for readmission if his offence was of such a kind that, after a lapse of time, he can satisfy the court that he has become trustworthy; or for a stated time, if the court is of opinion that the interests of the public will thereby be sufficiently protected.

It is enough if the respondent in a petition for his removal from the office of an attorney at law is reasonably and definitely informed of the matters alleged against him, and given an opportunity of being heard upon them; and if the general charge is in proper form, it is immaterial that the specifications are not proved exactly as alleged.

An attorney at law, who was retained to contest the allowance of a will, drew an instrument and signed it in behalf of his clients, by the terms of which A., the other party to it, agreed to aid them to the utmost of her power in the contest, and, in the event of success, A. was to receive a certain sum, and they a certain proportion each of the net amount obtained. In pursuance of this agreement, A., who had lived in the testator's family for a considerable time before his death, interviewed witnesses and aided in procuring evidence. The attorney, although he had a duplicate of the agreement in his possession, did not make known its existence, but, without disclosing that A. had an interest of this kind, called her as a witness at the trial, and she gave material testimony upon the subject of the testator's mental condition; and when the existence of the paper was finally shown, on cross-examination, and the judge requested that it be produced by the witness, and understood that she would produce it, the attorney sent her away, telling her that when he wanted her again he would send for her. Four days later, the witness not having returned, the attorney, being called upon for an explanation, said that he had a duplicate of the original among his papers in court, and he then searched for it, but did not find it; and the paper was not exhibited until two days later, when the witness returned to the court and produced it. Upon the trial of a petition for the disbarment of the attorney, the judge found that he tried to suppress the evidence in question,

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and that he was guilty of deceit, malpractice, and gross misconduct in his office. *Held*, that the finding was warranted.

An attorney at law, who was counsel for certain legatees under a will, knew when the executor filed his first account that he had failed to charge himself with as much by a certain sum for stock which he had sold as he ought to have done. The executor owed the attorney a sum of money which he declined to pay unless the attorney would assent to the allowance of the account in behalf of his clients. The attorney thereupon signed his assent in their names, obtained his pay, and the account was allowed. Upon the filing of the second account, he wrote to the executor's counsel, threatening the executor with an attack unless he paid the amount which his clients should receive, and proposing to keep the whole matter a secret if a payment was made. Upon the trial of a petition for the disbarment of the attorney, he testified that, when he assented to the first account, he intended, if his clients would authorize him so to do, to object to the allowance of the second account when filed, unless the executor would correct, to the extent of the interest of his clients, the first account. The judge found that he was guilty of deceit, malpractice, and gross misconduct in his office. *Held*, that the finding was warranted. FIELD, C. J., HOLMES & MORTON, JJ., dissenting upon the ground that the report of the judge showed that his judgment upon the specifications relating to this part of the case went upon a finding that the charges in those specifications were true as alleged, and was not reached from the point of view taken by the decision.

If, upon the trial of a petition for the disbarment of an attorney at law, the facts found, with the inferences that may be drawn from them, warrant a finding that he was guilty of deceit and gross misconduct in his office, it is immaterial that, in making his findings of fact, the judge has not attempted to make a complete analysis of the conduct described, nor to state all the particulars in which it was culpable.

PETITION to the Superior Court for the removal of the respondent from the office of an attorney at law.

The petition, after alleging that the respondent was admitted as an attorney by the Supreme Judicial Court on January 20, 1885, and that he "has ceased to be of good moral character, and has been guilty of deceit, malpractice, and other gross misconduct," contained thirteen specifications of charges, the first, third, fourth, and fifth of which only need be stated, and were, in substance, as follows.

1. In or about 1892, one Howard Gill, of Dedham, died, leaving an instrument purporting to be his last will, and duly executed. The will was offered for probate by one Elijah W. Bonnemort, named as executor and principal legatee therein, and was duly admitted to probate. Certain of the heirs of Gill appealed from the allowance of the will, and the matter of their appeal came on in due course to be heard in the Supreme Judicial Court, before a jury, upon issues duly framed.

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The issues raised the question of competency and soundness of mind on the part of the testator at the time of the making of the will. The respondent acted as attorney for the appellants. Shortly before the trial of the appeal, professing to act in behalf of the contestants or certain of them, he made an agreement in writing with one Florence Lowe, to the effect that she should do all that was in her power to aid the appellants in their appeal, and that, in case they should succeed in defeating the probate of the will, she should receive the sum of $500 as her compensation, and that certain relatives of Lowe should receive certain pecuniary advantage.

At the time of making the written agreement, it was known and agreed between the respondent and Lowe that she was to be and should be a witness for the appellants; that she should, at the trial of the appeal, testify to facts tending to show mental unsoundness and incapacity of the deceased at the time of the making of the will; and that such proposed testimony by her was part of the service contemplated by the agreement. Thereupon, and pursuant to the terms of the agreement, Lowe immediately proceeded to secure witnesses upon that point for the appellants, and procured numerous persons to testify thereupon in favor of the appellants. At the trial of the appeal, Lowe was called by the respondent as a witness, and testified to facts tending to show such unsoundness of mind and testamentary incapacity on the part of the deceased. The agreement with Lowe and her pecuniary interest in the result of the appeal were concealed by her and the respondent from the court and the jury, and the respondent, by so calling her as a witness, and by the concealment of the fraudulent agreement, falsely and fraudulently represented to the court and to the jury that no such agreement had been made, and that she was an ordinary witness not biased by pecuniary interest in the result of the controversy; and the fact of the agreement was disclosed to the court and the jury only by means of the cross-examination of Lowe by counsel for the appellee, and by an order of the court for the production of the written agreement. The agreement was produced only pursuant to the order of the court, and against the protest of the respondent. The agreement tended to the commission of perjury, and was unlawful, corrupt, and

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fraudulent, and the calling of Lowe as a witness, and the concealment of and failure by the respondent to disclose the fact of such agreement was a corrupt and fraudulent practice upon the court and the jury.

3. Shortly prior to May, 1894, one William Dunn of Hyde Park, died intestate. His will was duly admitted to probate, and one Henry A. Rich was duly appointed and qualified as executor thereof. In the Probate Court, in the proceedings relating to the settlement of the estate of Dunn, the respondent acted as attorney for three legatees under the will. Among the assets in the hands of Rich, as such executor, were thirty-six shares of the capital stock of a corporation named the American Tool Company, which were set forth in the executor's inventory, and were duly appraised at $4,680, that is, at $130 per share. Thereafter it became and was necessary and proper, and it was desired by all the beneficiaries of the estate, that Rich as such executor should sell all the stock for the settlement of the estate, and he thereupon determined to sell the same. The principals of the respondent were, under the will, entitled to share, in certain proportions, in the proceeds of the stock. The respondent thereupon, fraudulently devising and contriving to cause Rich, as such executor, to be charged in the probate proceedings in case of a sale of such stock for more than the amount of his proper liability in respect thereof, and for a sum greater than he should, in the exercise of due diligence and fidelity, receive for the stock, and believing that he would not be able to obtain for the stock more than $175 per share, fraudulently conspired with one John W. Chase, that Chase should send to Rich, as such executor, a written offer for the purchase by Chase from Rich of all the stock at the price of $200 per share; that Chase should thereafter ever refuse to carry out the offer, and that, in case of the sale of the stock by Rich at a price less than $200 per share, they should falsely and fraudulently pretend and assert to Rich and to the Probate Court that Chase had made the offer in good faith, and had ever been willing and ready and able, and had ever offered to carry out the same, and that Rich had fraudulently refused to accept the same, and in selling such stock for less than $200 per share had acted fraudulently, and had fraudulently diverted from the estate

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the difference between such sum as he should actually have received and the amount of Chase's offer.

Chase was not then of pecuniary ability to carry out such offer, and this he and the respondent then well knew. Pursuant to the false and fraudulent conspiracy, Chase, at the request of the respondent, and with his knowledge, thereupon sent to Rich, as such executor, a written offer, signed by Chase, to the effect that he would purchase of Rich, as such executor, all the stock at the price of $200 per share, or at a higher price, if a higher price should be necessary to the securing of such stock by Chase. Chase and the respondent both then intended that the offer should not be carried out by Chase. Rich received the written offer, and forthwith offered to sell to Chase all the stock at $200 per share, but Chase refused to comply with the offer or to buy the stock. Rich, as such executor, thereupon received an offer of $175 per share for all the stock from a person of pecuniary ability. In Rich's judgment it was advisable to accept the offer, and due diligence and regard for the interests of the estate required that he should accept it. Before accepting the same, he notified Chase thereof, and again offered to him the stock for $200 per share, and he then notified the respondent, as attorney for the legatees, of the offer of $175 per share, and his inability to find a purchaser at a higher price, and of his intention to accept the offer unless a higher price could be obtained by the respondent or by other beneficiaries of the estate.

Neither the respondent nor any of the persons so represented by him objected to the acceptance of the offer, or procured or pointed out the means of obtaining a higher price; but the respondent then expressly stated to Rich that the latter, in determining upon the question of accepting the offer of $175, must act upon his own sound judgment. Rich thereupon, using due diligence and skill, accepted the offer of $175, and sold all the stock at that price. After making such sale Rich duly filed in the Probate Court an account of his executorship, setting forth the sale at such price, made due oath to the account, and prayed to have it allowed. The respondent, assuming to act in behalf of his principals, assented in writing to the allowance of the account, and on May 8, 1893, the account was allowed, without objection from him or them. Thereafter,

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on or about April 4, 1894, Rich, as such executor, made a second account of his executorship, charging himself with the balance shown by the first account, and no more, and making no specific reference to such shares, and on the day last named he made oath before a justice of the peace that the same was just and true. By the filing of the second account, the first account was opened, and the allowance of the first account became and was pending before the Probate Court. Thereupon, and pending the matter of the allowance of the accounts, and before hearing thereon, the respondent, pursuant to such false and fraudulent conspiracy, informed Rich that he, the respondent, knew of the offer of Chase; falsely and fraudulently pretended to Rich that he, the respondent, believed it to have been a genuine and available offer; falsely and fraudulently represented and pretended to Rich that it was not an offer instigated by the respondent, but that it was, and that he believed it to have been, an independent offer of Chase; fraudulently demanded of Rich that he should account to the estate for the stock, or for proceeds thereof, at the rate of $200 per share; and fraudulently threatened, in case such demand was not complied with, to oppose the allowance of the accounts, in respect of the stock, and to contend in the Probate Court that Rich had wilfully and fraudulently declined a genuine offer for the stock of $200 per share, had fraudulently sold the stock at a less rate, and had thereby fraudulently diverted from the estate the sum of $900.

4. Certain legatees under the will, entitled to share in the proceeds of the stock, were not represented in the probate proceedings, or otherwise, by the respondent. At the time of making such fraudulent demand upon Rich, the respondent fraudulently offered to him that if he would pay to the respondent's three principals their respective net shares of the sum of $900, so alleged by the respondent to have been fraudulently diverted, he would, in their behalf, accept the same in full satisfaction of his demand; that he would, and his principals should, keep such transaction secret from their co-legatees, and that his principals should, or that he would in their behalf, assent in the Probate Court to the allowance of the accounts then on file, and would thereby join Rich in deceiving the co-legatees, and in

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fraudulently effecting the allowance of the accounts by the Probate Court, and would join Rich in falsely and fraudulently pretending to such co-legatees in and by the accounts so to be assented to that the respondent's principals were content with and had acquiesced in the sale set forth in the accounts and had been settled with by Rich upon that basis and no other, and that he would join Rich in deceiving the Probate Court in respect of the accounts, and would falsely and fraudulently represent to the court that he and that his principals believed the accounts to be just and true, and that he would thereby aid the executor in availing himself of his oath thereto, alleged by the respondent to be false.

5. Pending the allowance of the accounts, and at the time of making such demand and proposals to Rich, the respondent wrote and caused to be delivered to one Edmund P. Davis, then the attorney of record of Rich as such executor in the probate proceedings, and then the adviser of Rich, as such executor in the premises, as the respondent then well knew, a letter addressed to Davis. The respondent, at the time of writing and causing to be delivered such letter, intended that the same should be shown by Davis to Rich, and believed that it would be so shown. The letter, which was dated May 1, 1894, and signed by the respondent, was as follows:

"Brother Davis, — I suppose, on the whole, it is fairer, and perhaps would be better all around, if I should tell you, as attorney for Mr. Rich, that as attorney for Arthur Dunn, John Dunn, and Mr. Tuttle, as executor of the will of Mary Muxworthy, who are familiar with the facts, I shall have to attack Mr. Rich's account and ask to have his accounts disallowed, on the ground of misconduct in his trust, either negligence or fraud.

"On January 2, 1893, it seems that Dr. John W. Chase, of Dedham, sent by registered letter an offer to Mr. Rich as executor, offering him $200 per share for the whole thirty-six shares of stock in the American Tool Company, and stating that he would pay more, if necessary, to get it. Instead of taking this offer or offering the stock at public auction, it seems that Mr. Rich, for reasons of his own, either made an actual sale or went through the form of a sale of this stock, for $175 per share, thus clearly depriving the estate of at least $900. Arthur Dunn says

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that he told Mr. Rich that he would go $5 a share higher than any one else. The returns at the State House indicate that the stock was worth at that time over $300 per share. Dr. Chase tells me that Mr. Rich tried to side-track him by trying to induce him to buy the real estate as well as the shares, and he will be, in my judgment, a dead-open-and-shut witness against Mr. Rich upon this transaction, as he feels, with his knowledge of the case, that the estate has been treated in anything but a loyal manner by Mr. Rich. Now, the extent of my clients' interest, of course, is only thirty per cent. I know by Dr. Chase's offer that $900 more could have been realized at least for that stock than Mr. Rich accounts for. I have a private opinion that the loss to the estate is greater, but possibly that would be a matter of speculation, notwithstanding the returns of the State House would indicate a value of over $300. Thirty per cent dividends stock is not to be sneered at. If $200 be taken to be the basis of the stock, the interests of my clients would be $270. Now I have no personal feeling against Mr. Rich, and although my people do not naturally feel more kindly toward him through being informed of the condition above described, I feel quite sure no opposition will be made by them; in other words, that they will assent to the account, if Mr. Rich will pay to me for them what in fact they have suffered from the transaction. I am not giving any information to, or acting for, any one but those three clients. Of course, if Mr. Rich prefers to have the whole thing gone into, it is his right, but I think that he will see that it is for his own interest to make a settlement without a trial."

In and by such letter the respondent did by a written communication, and with intent to extort money and pecuniary advantage, maliciously threaten Rich that he would accuse Rich of criminal offences, to wit, of embezzlement, or fraudulent conversion or appropriation of, and of fraudulently disposing of assets of the estate; of fraud and malversation as an executor; and of perjury in and by his oath to the probate accounts.

Hearing before *Braley*, J., who made the following findings.

The evidence wholly fails to show any conspiracy by Chase and the respondent, as set forth in the third charge, or to show any improper conduct whatever on the part of Chase.

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The fourth and fifth specifications relate solely to the acts of the respondent. In passing upon them, the documentary evidence and the testimony of E. P. Davis, John W. Chase, and the respondent are considered. Chase, in good faith, made to Rich, as executor, an offer of $200 per share for the stock of the American Tool Company. This offer was never accepted by Rich, and he subsequently sold the stock for $175 per share. The stock was inventoried as worth $4,680, or $130 per share. There were other legatees under the will entitled to share in the proceeds of the stock, who were not represented in the probate proceedings or otherwise by the respondent. When Rich filed his first account as executor, on May 3, 1893, in the Probate Court, he accounted for the excess of the sale by him over the appraised value. To this account the respondent, representing his clients, and in their behalf, assented in writing, duly indorsed thereon, and the account was duly allowed on May 3, 1893. He testified that, when Rich should file his second account in the estate, it was his intention, if his clients would authorize him so to do, to object to the allowance of the second account, and make Rich account for his maladministration of the estate in the sale of the stock for a less sum than Chase had offered.

On April 4, 1894, the second account was filed, and the respondent alone appeared and asked for a hearing, and the account is now pending for allowance. On May 1, 1894, the respondent wrote to E. P. Davis, counsel for Rich, a letter, fully set out in specification five. The conduct of the respondent in so assenting to the account to which Rich had made oath that it was "just and true" tended directly to deceive the Probate Court as to the first account, and to enable the executor successfully to cover up what on the evidence in this case was maladministration of the estate, Chase at the time he made the offer being financially able and intending to carry it out and to purchase the stock; and no good reason was shown why the offer should not have been accepted. The respondent knew that such assent would have that effect. He was, to some extent, influenced to so assent by the payment to him by Rich, as executor, of the sum of $500, "for services in protection of the estate," and so charged in the first account, and Rich and his counsel, Mr. Davis, used this promise of payment by Rich to the respondent to get

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the latter's assent in behalf of his clients to the account. Such services had been properly rendered by the respondent, but Rich did not intend to pay therefor unless the respondent would assent to the account in behalf of his clients. His letter to Mr. Davis set out in specification five contained a fraudulent proposition, and also a threat to use his knowledge of the offer of Chase to Rich, not for the purpose of an honest settlement of the estate, but to gain an unlawful advantage for his clients, the effect of which would enable Rich thereby to escape an honest accounting of his trust in the Probate Court, and to defraud the other legatees. He intended to extort money and gain a pecuniary advantage by the threats therein contained. The charges set out in specifications four and five are fully proved.

This leaves specifications one and two of the petition to be considered. In June, 1893, Howard Gill, of Dedham, died, leaving an instrument purporting to be his last will, executed in July, 1892, which was duly offered for probate. This case, by proper proceedings, came on to be heard before a jury in the Supreme Judicial Court, in May, 1894, upon issues which raised the question of the testamentary capacity of the testator, and also whether the will had not been procured by fraud and undue influence practised upon him. The respondent appeared for and represented parties interested in Gill's estate as contestants. It appeared that some time prior to October 24, 1893, one Florence W. Lowe had some talk and correspondence with one of the contestants; that for some time prior to the death of Howard Gill, she had lived in his family; and that in January, 1891, he made a will, in which he devised, among other bequests, the sum of $500 to her. Upon consultation with counsel other than the respondent, she was advised that she had an interest in the contesting of the last will; that if it should be set aside, the former will would be established, and she would receive the legacy. Such counsel saw the respondent in relation to the subject matter, and subsequently the respondent, acting, as he claimed, with full authority from his clients, made an agreement with her, the substance of which was that if the contestants succeeded in their contest by a decree against the last will, or by settlement, they would allow out of the sum received by settlement, or, if they succeeded other than by settlement, the sum of $500 to Florence

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W. Lowe, and to Susan E. Lowe and P. M. Withington, all parties to the agreement, jointly one seventh of whatever sum they might receive, or one seventh the value of Gill's estate, after deducting the sum of $500 to be paid to Florence W. Lowe, and the expense of the contest; and further, Florence W. Lowe, Susan E. Lowe, and Withington, who were parties of the second part, "would, to the utmost of their power, aid said contestants in the preparation and conduct of said contest of said will."

This agreement was executed in duplicate, one copy being given to Florence W. Lowe, and the other retained by the respondent. At the time of the execution and delivery of this agreement, the respondent did not know that Florence W. Lowe would be a witness at the trial. Acting in pursuance of this agreement, Lowe did interview witnesses, and aided in the obtaining of evidence for the contestants. Subsequently, and before the case came on for trial, the respondent ascertained that Lowe had lived in the family of Howard Gill some time prior to his death, and was familiar with his habits, and would be a material witness as to his mental soundness at the trial of the issues. At the trial, the respondent, in examining the attesting witnesses to the last will, brought out the fact of the prior will, and that therein Lowe was a legatee in the sum of $500. In his opening of the case to the jury on behalf of the contestants, he alluded to the fact of the prior will, and that Lowe was named as a legatee therein, but did not make any reference directly or indirectly to the agreement. Subsequently Lowe was called as a witness by him in behalf of the contestants, to prove the mental unsoundness of the testator at the time of the execution of the last will; and she gave material testimony upon this issue. Upon the cross-examination, on May 25, Lowe was asked if she had any interest in the case, and at first made replies which tended to show that she had no interest except that which might arise if the last will was set aside, when the prior will might be established, and she might thereby receive her legacy.

Upon being pressed by counsel for the executor, she finally disclosed the fact of the agreement in existence between her and the contesting heirs. The judge thereupon, on May 29, ordered the agreement to be produced, and that Lowe should attend as a witness with it. After more or less delay, caused by the non-

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attendance of Lowe, she came into court on May 31 and produced the agreement. The respondent testified at the hearing of this petition, that if Lowe had not disclosed the fact of such an agreement being in existence, he did not intend and had not intended at any time to call the attention of the court thereto. It further appeared that Lowe was in attendance as a witness, not on subpœna or in expectation of receiving witness fees ordinarily paid, but relying solely upon such remuneration as might be afforded her under and by virtue of the agreement. After the fact had become known to the court that such an agreement was in existence, Lowe was ordered to attend and produce it. This was on Friday, May 25. She did not appear on Monday, May 28. On May 29, the judge called for her, and said to the respondent, "I thought, Mr. Greenhood, I asked the question whether Miss Lowe would be here to-day, and you said she would." The respondent denied having said so, stating that he said, "If necessary," but the judge replied, "I understood you said she would." On May 29, the respondent said to the judge that he had a duplicate original with him in court; but upon searching among his papers he did not find it, and at no time after the disclosure of the fact of the agreement and pending the order that Lowe should come into court and produce the agreement did he offer to show the judge the duplicate in his possession. Lowe, after her cross-examination, was re-examined by the respondent, but only as to whom she had consulted in reference to the agreement, and he made no statement to the judge of his knowledge of or connection with the matter, or that he would endeavor to produce it. Lowe, upon leaving the stand, said to the respondent that she felt that her answers on cross-examination, so far as they related to her interest in the case, and preceding her disclosure of the agreement, were not right, and that she was disturbed by them. She was not certain whether she asked the respondent to be again called to the stand for the purpose of explanation or qualifying what she had said, and was not prepared to say in express terms what she did say. Without deciding the exact fact, she was not recalled, and no attempt was made by the respondent to explain or to change in any way what she had said. The respondent remarked to her after she had left the witness stand that she "had put him in a hard

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place." It appeared that he was provoked and angry, and said "that when he wanted her again he would send for her"; and that when he said to the judge on May 28, that he expected her the next day, he had told her she need not come until he sent for her, and he had not then sent for her, and when he afterwards did send for her she came.

The fact that such an agreement was in existence was material evidence in the trial of the case, as affecting the credibility of the witness Lowe. From all the evidence the court is satisfied that the respondent did not desire the production of the agreement, and tried to suppress its appearing in evidence. The ageement in and of itself was not, as between Lowe and the contestants, immoral and against public policy. Florence W. Lowe did have an interest in the controversy by reason of the prior will and the bequest therein to her, and the subsequent expectation and knowledge of the respondent and herself that she would be called as witness for the contestants was not equivalent to a contract to that effect.

There is no evidence in the case which tends to show that the respondent did incite, instigate, or persuade the witness Lowe to commit perjury, and this charge is not sustained. So much of specification one as charges the respondent with misconduct at the trial of said case is proved.

Upon the above findings under specifications one, four, and five, the judge found "that the respondent violated his oath of office as an attorney, and was guilty of deceit, malpractice, and gross misconduct in his said office"; and entered judgment "that for these causes he be removed from the office of an attorney at law within this Commonwealth." The respondent appealed to this court.

The case was argued at the bar in March, 1896, and afterwards was submitted on briefs to all the judges.

R. M. Morse, for the respondent.

E. Greenhood, pro se, filed a brief.

L. S. Dabney, for the petitioner.

KNOWLTON, J. This is an appeal from a judgment of the Superior Court removing the respondent from the office of an attorney at law in the courts of the Commonwealth. The petition for his removal alleges that he was admitted as an attorney by the Supreme Judical Court on January 20, 1885, and that he

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"has ceased to be of good moral character, and has been guilty of deceit, malpractice, and other gross misconduct." Under this general charge there are specifications, of which the fourth, fifth, and so much of the first as charges the respondent with misconduct at the trial of the probate of the will of Howard Gill were found to be proved by the justice of the Superior Court who heard the petition.

Upon these findings the justice found that the respondent "was guilty of deceit, malpractice, and gross misconduct in his said office" of attorney, and entered judgment "that for these causes he be removed from the office of an attorney at law within this Commonwealth."

The proceedings were on the common law side of the court, and our jurisdiction is strictly defined by statutes. An appeal from the Superior Court to the Supreme Judicial Court in an action at law can be taken only from a judgment founded upon matter of law apparent on the record. Pub. Sts. c. 152, § 10; c. 150, § 7. In such an appeal the case cannot be transferred, but only the questions of law involved. These questions alone, and the necessary papers relating thereto, are entered in the law docket of the Supreme Judicial Court. Pub. Sts. c. 153, § 15; c. 152, § 12. *Commonwealth* v. *Scott*, 123 Mass. 418. In this case the only question of law apparent on the record is whether the general finding of "Guilty of deceit, malpractice, and gross misconduct in his said office," could legally be made on the pleadings and the elementary facts and findings set out in the record. This general question may be divided into two parts; first, whether the elementary findings and the general finding could properly be made upon the charges and specifications which were before the court without other charges and specifications; and secondly, whether the general finding of guilty was in substance warranted by the facts which appear on the record.

The Pub. Sts. c. 159, § 39, contain the following provision: "An attorney may be removed by the Supreme Judicial Court or Superior Court for any deceit, malpractice, or other gross misconduct, and shall always be liable in damages to the party injured thereby, and to such other punishment as may be provided by law." This provision is in accord with the general doctrine of the common law, under which courts have always

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deemed it a part of their duty to remove from his office any attorney who in character and conduct has ceased to be a person proper to be held out by the court to the public as trustworthy. If, as it seems probable, the provision was intended to cover only deceit or misconduct in the performance of his official duties, it does not limit the power of the court at common law to remove an attorney from his office, either permanently or temporarily, for crime or other gross misconduct not connected with any official act. It has been held in other jurisdictions that similar statutes do not take away the jurisdiction at common law to remove an attorney for causes not included in the statute, such as ceasing to be of good moral character within the meaning of these words as used in a statute prescribing the requirements for admission to the bar. *Delano's case*, 58 N. H. 5. *State* v. *McClaugherty*, 33 W. Va. 250. *Sanborn* v. *Kimball*, 64 Maine, 140. *Ex parte Wall*, 107 U. S. 265. *In re O——*, 73 Wis. 602, and cases cited. *In re Percy*, 36 N. Y. 651. *Serfass's case*, 116 Penn. St. 455. *In re Mills*, 1 Mich. 392. We are of opinion that under this statute, as well as at common law, the removal may be absolute, leaving the party to apply to the court for readmission if his offence was of such a kind that, after a lapse of time, he can satisfy the court that he has become trustworthy; or for a stated time if the court is of opinion that the interests of the public will thereby be sufficiently protected. See *In re Hill*, L. R. 3 Q. B. 543; *In re Blake*, 3 El. & El. 34.

The first objection to the findings in this case is that they do not exactly conform to the specifications under which they are made. It is true that not all of the matters charged in these specifications are proved, and that some fundamental facts, previously charged, to which these specifications refer, are not exactly as alleged. If this were a criminal prosecution, the respondent might be entitled to a verdict of "Not guilty by reason of variance." But it is not a criminal proceeding. Its primary purpose is not punishment, but the preservation of the purity of the courts and the protection of the public from attorneys who disregard their oath of office. *Randall, petitioner*, 11 Allen, 473. *Ex parte Secombe*, 19 How. 9. *Randall* v. *Brigham*, 7 Wall. 523. *Ex parte Wall*, 107 U. S. 265. *Ex parte Brounsall*, Cowp. 829.

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As was said in *Randall, petitioner, ubi supra*, in reference to procedure at common law, "No complaint, indictment, or information was ever necessary as the foundation of such proceedings. . . . No formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding." It is enough if in some proper way the attorney is reasonably and definitely informed of the matters alleged against him, and given an opportunity of being heard in answer to them. See also cases cited *supra*. In the present case it sufficiently appears that the matters relied on by the petitioner were made known in the charges and specifications, even though they were not stated accurately, and it is evident that the facts and evidence bearing upon the conduct in question were as fully presented on both sides as the parties chose to present them. If there had been objection on the ground of a variance, the specifications might have been amended. The general charge was in proper form, and it is immaterial that the specifications were not proved exactly as alleged.

We now come to the question whether the particular facts found were sufficient to warrant a general finding of guilty of deceit, malpractice, and gross misconduct in office. The respondent, in resisting the probate of a will, called as a witness Florence W. Lowe, who had entered into an agreement in writing with his clients to aid them to the utmost of her power in the contest against the allowance of the will. Two other persons entered into the same agreement, and the pay of all of them was made contingent on the success of his clients in the litigation. If they succeeded, she was to have five hundred dollars and the other two were to have one seventh of the net amount obtained by the contestants; if they failed she and her associates were to receive nothing. She had lived in the family of the testator for a considerable time before his death, and was a material witness upon the subject of his mental condition. The respondent drew this agreement, and signed it in behalf of his clients. In pursuance of the agreement Florence W. Lowe interviewed witnesses, and aided in procuring evidence, and testified at the trial. The temptation held out by this arrangement, and the danger that it would lead to a trial in part upon untrustworthy testimony, bring it perilously near, if not within the

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rule that forbids the making of similar agreements on grounds of public policy. *Patterson* v. *Donner*, 48 Cal. 369. *Marshall* v. *Baltimore & Ohio Railroad*, 16 How. 314. *Dawkins* v. *Gill*, 10 Ala. 206. *Gillett* v. *Logan County*, 67 Ill. 256. The respondent, although he had a duplicate of the agreement in his possession, did not make known its existence, produced Florence W. Lowe as a witness without disclosing that she had an interest of this kind, and when the existence of the paper was finally shown, on cross-examination, and when the presiding justice requested that the paper be produced by the witness, and it was understood that she would produce it, he excused her from further attendance, or sent her away, and told her "that when he wanted her again he would send for her." This was on May 25. On May 29, the witness not having returned, and the court having called for her and called upon him for an explanation, he said that he had a duplicate original among his papers in court, and he then searched for it, but did not find it. The paper was not exhibited until on May 31 the witness returned to the court and produced it. We think the finding of the court, that he tried to suppress this evidence, was well warranted. Whatever may be thought of his conduct up to the time when the existence of the paper was disclosed in cross-examination and the paper was called for by the judge, it was clearly his duty then, if not to do what he could to obtain and present the evidence, at least to do nothing to conceal or suppress it. He had taken an official oath to "do no falsehood, nor consent to the doing of any in court," and to conduct himself "with all good fidelity as well to the courts" as to his clients. Pub. Sts. c. 159, § 36. Fidelity to the court required him, when he had in his possession an important paper which the court called for to be put in evidence, to produce it. Instead of producing it, he waited four days without disclosing that he had any connection with it, and it was two days more, after a formal order from the judge, before the paper was obtained from his witness, who, in the mean time, had been staying away under his direction.

The question before us on this branch of the case is, not whether these facts necessarily show deceit, malpractice, or other gross misconduct, but whether they furnish any evidence of it from which the court could find it by way of inference

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or otherwise. With reference to the question with what purpose and intent he was acting, it is to be remembered that much importance is to be attached to evidence which was before the trial court that cannot be put upon paper. Not only were other witnesses personally present before the court, but the respondent himself was a witness whose look and manner in giving his testimony may have been even more significant upon this question than his words. There is nothing upon the record to indicate that there was any error of law on the part of the court in making the original finding of guilty on this branch of the case.

In regard to the fourth and fifth specifications, it appears that when Rich filed his first account the respondent knew that he had failed to charge himself with as much by about nine hundred dollars for the stock as he ought to have done. He did not act in the interest of his clients at this time by objecting to the account and having the error corrected. So far as appears, he did not disclose his knowledge to anybody. Rich owed him a sum of money which he declined to pay unless the respondent would assent to the allowance of the account in behalf of his clients. The respondent, therefore, signed his assent in their names, obtained his pay, and the account was allowed. His signing tended to mislead the judge of the Probate Court and all who were to share in the balance in the hands of the executor. He testified that when he signed his assent he intended to wait until the second account was presented, and then to object to the allowance of that unless the executor would correct, to the extent of the interest of his clients, the first account which had been allowed with his assent, given for his personal advantage in such a way as to deceive the executor, the judge of the Probate Court, and the persons interested in the proceeds of the estate, including, so far as appears, his own clients. Thereupon, on the filing of the second account, he wrote a letter to the executor's counsel threatening the executor with an attack unless he paid the amount which his clients should receive, and proposing to keep the whole matter a secret if a payment was made. His conduct in reference to Rich, in giving his assent to the account and thereby obtaining his pay, and professing to make a written assent of his clients that would be valid and

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effectual, when all the time he had a secret intention to avoid the assent on the filing of the second account, was dishonest. In reference to his clients, it is not to be inferred that they consented to his signing their assent to the allowance of an account which he knew gave them much less than they were entitled to, on the chance of subsequently getting the account opened to correct the error. His testimony that it was his intention when Rich should file his second account to object to the allowance of it "if his clients would authorize him so to do," plainly implies that he signed their assent without telling them of the error or conferring with them about the action to be taken in regard to it. His own interest to get his pay, which was the inducement to him to sign this assent, coupled with his threatening letter and proposal of secrecy after the second account was filed, warranted the judge of the Superior Court in inferring that in this he was wanting in fidelity to his clients, as well as to the court. To represent that his clients assented to the account under these circumstances was a direct fraud upon the Probate Court. His subsequent attempt to obtain what belonged to them, not by having the account corrected, but in an indirect way, does not relieve his conduct of its deceit and impropriety. We do not intimate that an attorney may not settle a claim in behalf of his clients, without stopping to see that justice is done to others who may have a similar claim, and without always disclosing irregularities of which he has knowledge, and for which he is not responsible. But what the respondent did was much more than this. The facts found, with the inferences that may be drawn from them, well warrant a finding that he was guilty of deceit and gross misconduct in his office of attorney, and it is immaterial that, in making his findings of fact, the judge has not attempted to make a complete analysis of the conduct described, nor to state all the particulars in which it was culpable.

It is important that the oath of office taken by attorneys on admission to the bar should not be considered and treated by those who take it as an empty form. Nothing in the life of the people more deeply concerns their welfare than the administration of justice in our courts. The high standard of integrity which is prescribed by our Constitution and our laws for the officers of our courts should be maintained. The removal or

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suspension of an attorney is necessarily damaging to him, and may even be ruinous. It should only be ordered after a careful investigation of the alleged causes for it. But when it appears that one has ceased to regard the principles of morality, and that fidelity to truth and justice without which the practice of law is mockery, a court should not hesitate to remove him.

The question whether the interests of the public require a judgment of absolute removal, or of removal only for a time, is not before us. Like the imposition of a sentence on conviction of a crime, it involves a consideration of questions of fact, and is to be determined by the trial court in the exercise of its discretion. *Judgment affirmed.*

The Chief Justice and Justices Holmes and Morton do not agree with the decision upon the fourth and fifth specifications. In their opinion the report of the judge shows that his judgment upon them went upon a finding that the charges of those specifications were true as alleged, and was not reached from the point of view taken by the decision, which avowedly differs from that of the specifications. They are apprehensive that the decision of the Superior Court on these specifications was founded upon a questionable conception of a lawyer's duty, and now is supported upon grounds which have not been considered or passed upon by the Superior Court.

BARTH TELLEFSEN *vs.* PETER P. FEE.

Suffolk. November 19, 1895. — March 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Assault — False Imprisonment — International Law — Writ — Jurisdiction.

Under Art. 13 of the treaty between the United States and the Kingdom of Sweden and Norway of 1827, 8 U. S. Sts. 346, 352, the courts of this country have no jurisdiction of an action for wages, brought by a seaman against the master of a Norwegian vessel.

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Where a court has no jurisdiction of the subject matter of the controversy, or over the persons of the parties, an officer who is informed of facts concerning the truth of which he can have no reasonable doubt, which show, as matter of law, that the court has no jurisdiction, proceeds at his peril in making an arrest in a civil process, although the want of jurisdiction does not appear on the face of the process. KNOWLTON, J. dissenting.

TORT, for assault and false imprisonment. The defendant, a constable of the city of Boston, justified under a writ issued by the Municipal Court of said city, in favor of Nels C. Johnson, described as of Boston, against one Tellefsen, described as master of the steamship Albert, commorant of said Boston. The declaration was on an account annexed for work on the steamship. To the writ was annexed a certificate of a master in chancery authorizing the arrest, if the arrest was authorized by law.

At the trial in the Superior Court, before *Hopkins*, J., it appeared that the defendant was a duly qualified constable of the city of Boston; that one Nels C. Johnson, a Norwegian subject, sued out the writ set up in justification to recover money alleged to be due to him for services as one of the crew of the steamship Albert, a Norwegian vessel, of which vessel the plaintiff, a Norwegian subject, was captain; that the steamship was about to leave port; that Johnson had shipped without signing shipping papers with the plaintiff, at the port of New York, for the run to Boston; and that Johnson left the ship at Boston because his term of service had expired.

It also appeared that the arrest of and the alleged assault upon the plaintiff were made upon the deck of the vessel while she was lying at the wharf, the plaintiff being handcuffed; that the defendant was informed before he made the arrest that the vessel was a Norwegian one, and that the plaintiff was a Norwegian subject, and was captain of the vessel; and that the claim of Johnson would be adjusted at the consulate of the Kingdom of Sweden and Norway in Boston. It also appeared that the defendant kept the plaintiff under arrest upon the deck of the vessel and in the cabin until the plaintiff paid the defendant under protest the amount claimed to be due to Johnson.

The evidence as to the amount of force used by the defendant, and as to the character of the arrest, was contradictory.

At the close of the testimony the plaintiff asked the judge to rule that, by the treaty between the United States and the King-

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dom of Sweden and Norway, the plaintiff was exempt from arrest at the time the defendant arrested him, and that the process with which the defendant was armed at the time he made the arrest was not sufficient to justify the defendant in arresting him under the circumstances disclosed in the case, the plaintiff being a Norwegian and upon a Norwegian vessel and in command of it; but the judge refused upon all the evidence so to rule, and ruled that the defendant, under his writ, was justified in making the arrest unless the jury should find that he used excessive force, and instructed the jury as to what would constitute excessive force in a manner not excepted to by the plaintiff. To which ruling and refusal to rule the plaintiff excepted.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The counsel for the defendant were not the counsel who made the attachment in the original case, and the counsel for the plaintiff did not appear in the case in the Superior Court.

The case was argued at the bar in November, 1895, and afterwards was submitted on briefs to all the justices.

J. Lowell & E. S. Dodge, for the plaintiff.

B. Hall, (*A. F. Coulter* with him,) for the defendant.

LATHROP, J. The Municipal Court of the city of Boston had no jurisdiction of the action brought against the plaintiff in this case for wages alleged to be due one Johnson, and the writ upon which the plaintiff was arrested on mesne process was of no effect.

By art. 13 of the treaty between the United States and Sweden and Norway of 1827, 8 U. S. Sts. 346, 352, it is provided that "the consuls, vice-consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country; or the said consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment, or arbitration, shall not

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deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

There are similar treaties with other countries, including one with Prussia in 1828, 8 U. S. Sts. 378, 382. Many of these treaties are referred to in 7 Am. Law Rev. 417. Later treaties have been made with the Netherlands, in 1855, 10 U. S. Sts. 1150, 1155; with Denmark, in 1861, 13 U. S. Sts. 605; with Germany, in 1871, 17 U. S. Sts. 921, 928; and with Italy, in 1878, 20 U. S. Sts. 725, 729.

By art. 6 of the Constitution of the United States, it is declared that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Such a treaty as that with Sweden and Norway has almost uniformly been held to take away all right of action for wages in the courts of this country, by a seaman coming within the scope of the treaty, whether the action be *in rem* or *in personam*. *Norberg* v. *Hillgreu*, 5 N. Y. Legal Obs. 177. *The Elwine Kreplin*, 9 Blatchf. C. C. 438, where the question is considered at length. *The Salomoni*, 29 Fed. Rep. 534. *The Burchard*, 42 Fed. Rep. 608. *The Marie*, 49 Fed. Rep. 286. *The Welhaven*, 55 Fed. Rep. 80.

In *The Amalia*, 3 Fed. Rep. 652, jurisdiction was entertained by Judge Fox of the United States District Court in Maine of a libel against a Swedish vessel, on the ground that there was no consular representative of Sweden in the District of Maine. But this case has no bearing upon the one before us.

An examination of the treaty and authorities above cited makes it plain that the court has no discretion in the matter, and that the local authorities have no right to interfere. Where jurisdiction is given by a treaty to a consul, vice-consul, or a commercial agent, he alone has authority to act in determining in the first instance whether wages are due, and the amount.

It is to be remembered that the United States government has the same right by the treaty in regard to its vessels in Norway; and this right is insisted upon by our government. In the United States Consular Regulations of 1888, p. 25, par. 66, under the

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title "Jurisdiction over Disputes between Masters, Officers, and Crews," appears the following: "Exclusive jurisdiction over such disputes in the vessels of the United States, including questions of wages, is conferred by treaties or conventions with" several governments named, and, among them, Sweden and Norway. And on p. 92, par. 273, is also the following: "In many instances, by treaty and consular convention, the United States have secured to their consular officers jurisdiction over questions of wages, shipment, and discharge of seamen."

The bill of exceptions is not so full as it should be as to what occurred on the arrival of the ship in Boston. It is merely said that "Johnson left the ship at Boston because his term of service had expired." It does not appear whether he had been discharged, or had left without permission of the master, though perhaps the more reasonable interpretation of the exceptions is that the statement of the cause of his leaving precludes our assuming other reasons to exist. However this may be, whether he was discharged or not, there was still the question of wages to be determined, and the defendant had been informed before he made the arrest that the claim of Johnson would be adjusted at the consulate of the Kingdom of Sweden and Norway. It seems to us impossible to say that there was not such a difference between the master and Johnson that the consul had not exclusive jurisdiction in the premises.

The facts in the case of *The Elwine Kreplin* are not fully set forth in the report in 9 Blatchf. C. C. 438. But they are found at length in the report of the case in the District Court, 4 Ben. 413. It was there considered by Judge Benedict that the connection of the men with the ship was severed by mutual consent, and that they were entitled to their wages. While this view of the facts was not fully assented to by Judge Woodruff, his opinion was, that although the men were entitled to their discharge and to be paid off, and the master was in the wrong, yet this matter of difference "was left by the treaty in the hands of the consul"; and the libel of the seamen was dismissed.

In *The Burchard*, 42 Fed. Rep. 608, Judge Toulmin dismissed a libel for wages against a German vessel brought by an American seaman who had shipped on board, and who claimed to be entitled to a discharge. He stated, however, that he was in-

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clined to take jurisdiction, if the fact had been proved that a discharge had been granted.

In the later case of *The Welhaven*, 55 Fed. Rep. 80, a libel was brought against a Norwegian steamship by a citizen of the United States, for damages and for wages, alleging that he shipped on the vessel at Mobile, for a round voyage to Tampico, and that, on his arrival in Mobile Bay, on the return trip, he was put ashore, manacled, and finally discharged at Mobile, without full pay. On the intervention of the Norwegian consul, claiming jurisdiction, Judge Toulmin sustained the consul's position, and dismissed the libel. The case appears to have been heard on exceptions to the libel, as the judge concludes the opinion thus: "I am, therefore, constrained to sustain the exceptions to the libel, and to order that the libel be dismissed."

It appears, therefore, that the consul of Sweden and Norway had exclusive jurisdiction of the controversy or difference between Johnson and Tellefsen, and that the Municipal Court of the city of Boston had no jurisdiction either of the subject matter or of the persons of the parties in the action which the seaman saw fit to bring against the master. The officer who arrested the master was therefore acting illegally and without justification, and is liable in this action, unless he is protected by virtue of his writ. This presents a question of some difficulty and one which is not wholly free from doubt.

Before proceeding to consider the principal question, it may be well to state briefly certain principles laid down by the courts in regard to which there is little or no dispute.

Where the process is in due form and comes from a court of general jurisdiction over the subject matter, the officer is justified in acting according to its tenor, even if irregularities making the process voidable have previously occurred. *Savacool* v. *Boughton*, 5 Wend. 170. *Earl* v. *Camp*, 16 Wend. 562. *Ela* v. *Shepard*, 32 N. H. 277. *Howard* v. *Proctor*, 7 Gray, 128. *Dwinnels* v. *Boynton*, 3 Allen, 310. *Chase* v. *Ingalls*, 97 Mass. 524. *Hubbard* v. *Garfield*, 102 Mass. 72. *Bergin* v. *Hayward*, 102 Mass. 414. *Rawson* v. *Spencer*, 113 Mass. 40. *Chesebro* v. *Barme*, 163 Mass. 79, 82. *Hines* v. *Chambers*, 29 Minn. 7. *Hann* v. *Lloyd*, 21 Vroom, 1.

Where, however, the process is void on its face, the officer is

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not protected. *Clark* v. *Woods*, 2 Exch. 395. *Pearce* v. *Atwood*, 13 Mass. 324. *Eames* v. *Johnson*, 4 Allen, 382. *Thurston* v. *Adams*, 41 Maine, 419. *Harwood* v. *Siphers*, 70 Maine, 464. *Brown* v. *Howard*, 86 Maine, 342. *Rosen* v. *Fischel*, 44 Conn. 371. *Frazier* v. *Turner*, 76 Wis. 562. *Sheldon* v. *Hill*, 33 Mich. 171. *Poulk* v. *Slocum*, 3 Blackf. 421.

An officer is bound to know the law, and to know the jurisdiction of the court whose officer he is; if, therefore, he does an act in obedience to a precept of the court, and the court has no jurisdiction in the matter, either because the statute under which the court acted is unconstitutional, or there is a want of jurisdiction for any other reason, it would seem that the officer is not protected. There are many authorities to this effect. *Fisher* v. *McGirr*, 1 Gray, 1, 45. *Warren* v. *Kelley*, 80 Maine, 512. *Batchelder* v. *Currier*, 45 N. H. 460. *Thurston* v. *Martin*, 5 Mason, 497. *Campbell* v. *Sherman*, 35 Wis. 103. *Sumner* v. *Beeler*, 50 Ind. 341. *The Marshalsea*, 10 Rep. 68 b. *Crepps* v. *Durden*, Cowp. 640. *Brown* v. *Compton*, 8 T. R. 424. *Watson* v. *Bodell*, 14 M. & W. 57.

Whether this doctrine applies to a case like the present, where the court had general jurisdiction over the subject matter, but no jurisdiction over the particular controversy between the parties, and no jurisdiction over their persons, we need not decide, because on the facts in this case we are of opinion that the officer may be held liable.

He was informed before making the arrest that the vessel was a Norwegian vessel, and the captain of the vessel a Norwegian, and that the claim of Johnson would be adjusted at the consulate of the Kingdom of Sweden and Norway. Being informed of the facts, he was bound to know the law, that the court had no jurisdiction over the person of the captain or the subject matter of the action. *Sprague* v. *Birchard*, 1 Wis. 457, 464, 469. *Grace* v. *Mitchell*, 31 Wis. 533, 539, 545. *Leachman* v. *Dougherty*, 81 Ill. 324, 327, 328.

There are, without doubt, cases which lay down a more stringent rule, and say that the officer need not look beyond his precept, and is not bound to take notice of extrinsic facts; but all of these are cases which are distinguishable from the case at bar. The leading case on this subject is *People* v. *Warren*, 5

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Hill, (N. Y.) 440. The defendant was indicted for assaulting an officer. The inspectors of an election issued a warrant to a constable for the arrest of the defendant, for interrupting the proceedings at the election by disorderly conduct in the presence of the inspectors. The defendant offered to show that he had not been in the presence of the inspectors at any time during the election, and that the constable knew it. This was held to be rightly excluded. The opinion is *per curiam*, and is very brief. While it says that the inspectors had no jurisdiction of the subject matter, yet the clear meaning is, that, if the defendant was not in their presence, they acted in excess of their jurisdiction. Knowledge by an officer that a man was innocent would of course be no excuse for assaulting the officer, if he arrested the man upon a warrant from a court of competent jurisdiction. An officer in a criminal case is obliged to obey his warrant, whatever his knowledge may be. This disposes also of the case of *State* v. *Weed*, 21 N. H. 262.

Several cases have been called to our attention in which there are dicta to the effect that an officer is not bound to look beyond his precept, even if he has knowledge that the court has no jurisdiction; but an examination of these cases shows that the facts known to the officer did not affect the jurisdiction of the court, but related to irregularities in the prior proceedings, or to matters merely of defence to the action. See cases above cited.

Of course, where the court has jurisdiction of the subject matter and of the parties to an action, knowledge on the part of the officer, or information to him that there is some irregularity in the proceeding can make no difference. *Underwood* v. *Robinson*, 106 Mass. 296. Nor can it make any difference that the officer is informed that there is a defence to the action, such as that the defendant has a receipt; *Twitchell* v. *Shaw*, 10 Cush. 46; or a discharge in insolvency; *Wilmarth* v. *Burt*, 7 Met. 257; or that the defendant is an infant; *Cassier* v. *Fales*, 139 Mass. 461.

But the question of jurisdiction is a more serious matter, and if facts are brought to the attention of the officer about which he can have no reasonable doubt, and he knows, or is bound to know, that on these facts the court has no jurisdiction of the controversy, he may well be held to proceed at his peril.

We can see no hardship upon the officer in holding him re-

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sponsible in this case for an illegal arrest and for a false imprisonment. If an officer has reasonable cause to doubt the lawfulness of an arrest, he may demand from the plaintiff a bond of indemnity, and so save himself harmless. *Marsh* v. *Gold*, 2 Pick. 285, 290. We are not aware that this case has ever been doubted; and in practice, bonds of indemnity have often been required.

In the case at bar, after receiving full information, he chose to proceed, and, in defiance of the treaty, to subject the subject of a foreign nation to a gross indignity, for the purpose of extorting money from him, under the guise of a precept which the court had no jurisdiction to issue, and which it would not have issued had the facts been before it.

We approve of the language of Mr. Freeman in 21 Am. Dec. 204, where, after a discussion of the cases bearing upon the question of the liability of an officer, he says: "We apprehend, at all events, that the protection of process cannot so far extend as to protect an officer who, from all the circumstances of the case, does not appear to have acted in good faith, and whose conduct shows that his eyes were wilfully closed to enable him not to see and know that he was a too ready instrument in the perpetration of a grievous wrong."

In the opinion of a majority of the court, the instruction requested should have been given. *Exceptions sustained.*

KNOWLTON, J. It seems to me that the opinion of the majority of the court is wrong in holding that the defendant was bound to receive statements made by the plaintiff or others for the purpose of determining whether he could lawfully serve a writ which was regular in form, and which on its face showed a case within the jurisdiction of the court. The exceptions on this point present a naked proposition of law, and raise no question in regard to the good faith of the defendant in performing his official duty. The writ which he served stated an ordinary case for the collection of a debt. An officer is bound to know the law, even to the extent of determining whether a statute on which his process is founded is or is not constitutional. But for the facts, he is not called upon to take the testimony of anybody in regard to anything outside of the statements contained in the

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process, nor even to act upon what he believes to be his own knowledge. The jurisdiction which the court must have in order to justify him is jurisdiction of the case stated in the writ. It may turn out that there was no real case upon which to issue a writ, and that the prosecution is grossly malicious, or that there is a real case materially different from that stated, and which does not come within the jurisdiction of the court, but the officer is not bound to inquire into matters of this kind. This has been held in a great many cases in Massachusetts and elsewhere, and the reasons for the rule have been elaborately stated in different jurisdictions. These reasons seem to me fully to cover the present case. *Twitchell* v. *Shaw*, 10 Cush. 46. *Wilmarth* v. *Burt*, 7 Met. 257. *Donahoe* v. *Shed*, 8 Met. 326. *Fisher* v. *McGirr*, 1 Gray, 1, 45. *Clarke* v. *May*, 2 Gray, 410. *Chase* v. *Ingalls*, 97 Mass. 524. *Underwood* v. *Robinson*, 106 Mass. 296, 297. *Rawson* v. *Spencer*, 113 Mass. 40, 46. *Cassier* v. *Fales*, 139 Mass. 461. *State* v. *Weed*, 21 N. H. 262. *Batchelder* v. *Currier*, 45 N. H. 460. *Watson* v. *Watson*, 9 Conn. 140. *Warren* v. *Kelley*, 80 Maine, 512, 531. *Earl* v. *Camp*, 16 Wend. 562. *Webber* v. *Gay*, 24 Wend. 485. *People* v. *Warren*, 5 Hill, (N. Y.) 440. *Hann* v. *Lloyd*, 21 Vroom, 1. *Taylor* v. *Alexander*, 6 Ohio, 144, 147. *Henline* v. *Reese*, 54 Ohio St. 599. *Wall* v. *Trumbull*, 16 Mich. 228, 234.

The cases in Wisconsin and Illinois cited in the opinion are the only ones that I have been able to find, after considerable investigation, which hold a different doctrine. On the authorities cited above I am unable to see that it makes any difference whether the outside information communicated to the officer, if taken to be true, would show the real case to be one upon which such a precept cannot properly be issued, because it comes within a treaty giving exclusive jurisdiction to another tribunal, or would show the precept to be unwarranted for any one of numerous other causes. That the defendant in the original action happens to be a captain of a Norwegian ship, and to owe the plaintiff in his official capacity, gives him a privilege of which he may or may not avail himself to take the case out of the general jurisdiction of the court. I think this fact calls for the application of the same principle as a strictly personal privilege. Indeed, the principle of the cases seems to cover every kind of external

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fact which operates to take away a jurisdiction that appears to be perfect on the face of the papers.

It has been held that an officer may, if he chooses, act upon his knowledge or information of actual facts which show that the court was without jurisdiction, and refuse to serve the writ. *Earl* v. *Camp*, 16 Wend. 562. *Henline* v. *Reese*, 54 Ohio St. 599. But this is very different from requiring him, at his peril, to determine questions of fact. I think the exceptions should be overruled.

WILLIAM W. BRAUER & another *vs.* FRANK SHAW & others.

SAME *vs.* SAME.

Suffolk. January 14, 1897. — March 29, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Contract — Offer — Acceptance — Revocation.

If an offer is accepted by telegraph before a telegram revoking it has been sent, the acceptance being received before the revocation of the offer is received, the offer is outstanding when accepted, and there is a completed contract.

TWO ACTIONS OF CONTRACT, for the alleged breach of two contracts. The cases were tried together in the Superior Court, before *Lilley*, J., who ruled, as requested by the defendants, that the plaintiffs were not entitled to recover in either action, and directed the jury to return a verdict for the defendants in each case; and the plaintiffs alleged exceptions. The facts appear in the opinion.

H. M. Rogers, for the plaintiffs.

B. L. M. Tower, (*F. A. North* with him,) for the defendants.

HOLMES, J. These are two actions of contract, on alleged contracts letting all the cattle carrying space on the Warren line of steamships for the May sailings from Boston to Liverpool, the first contract at the rate of fifty shillings a head, the second and alternative one at fifty-two shillings and sixpence. As we are all of opinion that, for one reason or another, the

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right to recover upon the first contract is not made out, it may be stated shortly. On April 15, 1892, after earlier correspondence, the defendants wrote stating terms, saying that they had telegraphed that they "would probably accept 50/s. if reply promptly," referring to an answer asking to have the space kept until noon the next day, and to their reply that they would "try to keep space for you," and adding that there were several customers, and that they should feel "duty bound to let it to the first man making the best bid." The plaintiffs' agents telegraphed at fifty-three minutes past eight the next morning, making a modified offer. Whether they had received the above letter does not appear. The defendants answered, "referring our letter yesterday first offer for number named has preference three parties considering. Wire quick if you want it." This was received in the New York telegraph office at fifteen minutes past ten. At twenty minutes past ten the plaintiffs' agents telegraphed, "Have closed all your May spaces as per letter," etc. This is relied on as making the contract. It does not appear whether the telegram which arrived only five minutes before had been received. If not, and if the last telegram was in answer to the letter only, the plaintiffs would encounter the question whether the letter contained an absolute offer or only invited one, and if the former, whether the offer had not been rejected by the modified offer in the first telegram mentioned. However this may be, the parties did not stop at the point which we have reached but went on telegraphing as we shall state, so that if there was any moment when a contract had been made the parties assumed the contrary and continued their bargaining. Either no contract had been made thus far, or it was discharged by the conduct of the parties. It was treated as discharged in a letter of the plaintiffs' agents written later on the same day.

We come then to the later telegrams of the same day, which are relied on as making the second contract. At half past eleven the defendants telegraphed, "Subject prompt reply will let you May space fifty-two six." This was received in New York at sixteen minutes past twelve, and at twenty-eight minutes past twelve a reply was sent accepting the offer. For some reason this was not received by the defendants until twenty

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minutes past one. At one the defendants telegraphed revoking their offer, the message being received in New York at forty-three minutes past one. The plaintiffs held the defendants to their bargain, and both parties stand upon their rights.

There is no doubt that the reply was handed to the telegraph company promptly, and at least it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If then the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even, the revocation of the offer had not been received. It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it had been revoked. By their choice and act they brought about a relation between themselves and the plaintiffs which the plaintiffs could turn into a contract by an act on their part and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose that you offer and to offer are the same thing. *O'Donnell* v. *Clinton*, 145 Mass. 461, 463. *Cornish* v. *Abington*, 4 H. & N. 549. The offer must be made before the acceptance, and it does not matter whether it is made a longer or a shorter time before, if by its express or implied terms it is outstanding at the time of the acceptance. Whether much or little time has intervened it reaches forward to the moment of the acceptance, and speaks then. It would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer and the act relied on a step looking to but not yet giving notice. The contrary suggestion by Wilde, J., in *M'Culloch* v. *Eagle Ins. Co.* 1 Pick. 278, 279, is not adopted as a ground of decision, and the view which we take is that taken by the Supreme Court of the United States, and is now the settled law of England. *Tayloe* v. *Mer-*

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chants' Ins. Co. 9 How. 390, 400. *Patrick* v. *Bowman*, 149 U. S. 411, 424. *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344. *Stevenson* v. *McLean*, 5 Q. B. D. 346. *Henthorn* v. *Fraser*, [1892] 2 Ch. 27. *Thomson* v. *James*, 18 Ct. of Sess. Cas. (2d series) 1. Langdell, Con. § 180. *Drew* v. *Nunn*, 4 Q. B. D. 661, 667. *Wheat* v. *Cross*, 31 Md. 99, 103. *Kempner* v. *Cohn*, 47 Ark. 519, 527.

It is unnecessary to consider other reasons which were urged for our decision. *Exceptions sustained.*

DANIEL T. CONNOLLEY, petitioner.

Suffolk. January 26, 1897. — March 29, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Quieting Title — Quitclaim Deed — "Record Title" — Statute.

A quitclaim deed, duly recorded, of land acquired in part by disseisin, which the grantor has a good right to convey, gives to the grantee a "record title" to the whole estate, within the meaning of St. 1893, c. 340, § 1, relating to quieting titles to real estate.

PETITION, under St. 1893, c. 340, filed October 23, 1895, to quiet the petitioner's title to certain real estate in Boston. Hearing in this court, before *Allen*, J., who reported the case for the consideration of the full court, in substance as follows.

Sarah Davis, whose will was duly proved and allowed on or about May 15, 1847, died seised of one undivided half interest in the premises in question. In 1836, when she made the will, she had been seised of one undivided third part thereof only. By her will she devised one third part of the premises to her only sister, Susannah Davis, for life, with remainder to her two nephews, Charles and Horatio Davis, sons of her only brother, Charles Davis, who deceased in 1845. Sarah Davis died intestate as to the remaining one sixth interest in the premises, which descended to her sister Susannah and to the eleven children of her brother Charles. Susannah Davis died testate in 1851, seised of her original one half, together with the one twelfth which descended to her by reason of Sarah's partial intestacy,

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making seven twelfths in all, and from her Charles and Horatio each derived title to seven twenty-fourths. Charles and Horatio, as two of the eleven children and heirs of their father, each, by reason of Sarah's partial intestacy, derived title by descent from her to $\frac{1}{132}$.

This left the title, in 1851, after Susannah's death, as follows. Charles and Horatio each had $\frac{14}{264}$ in all. Their nine sisters had by descent the remaining $\frac{9}{132}$, or $\frac{18}{264}$. Then Horatio, assuming to have one half, made a deed of warranty thereof in the usual form to Charles in 1851, which deed was duly recorded. This gave to Charles in reality $\frac{23}{264}$, but ostensibly $\frac{25}{264}$.

Charles died testate in 1888, and devised his estate in the premises, such as it was, to his five children, who were Charles Davis, Jr., James V. Davis, Cornelius Fellows Davis, Garafelia D. Chase, and Mary S. Hutchins. Cornelius Fellows Davis thereafter, on November 28, 1888, released all his interest in the premises to his four sisters and brothers, by a quitclaim deed in the usual form.

On December 15, 1894, Charles Davis, Jr., James V. Davis, Garafelia D. Chase, and Mary S. Hutchins released the premises to the petitioner by a quitclaim deed in similar form.

The petitioner showed that actual, open, and continuous adverse possession of the premises by Charles Davis and his children was had against all their tenants in common for forty-three years, from 1851 to 1894, when the premises were conveyed to the petitioner, and presented releases from most of the possible claimants under the nine sisters of Charles and Horatio Davis, to whom the outstanding $\frac{18}{264}$ descended by reason of Sarah's partial intestacy.

The judge ruled that, after the warranty deed from Horatio to Charles in 1851, the title of $\frac{18}{264}$ in fact remained in other heirs of Sarah than Charles; that Horatio's deed of warranty to Charles of one half, accepted and acted upon, gave to Charles a record title to one half in addition to the $\frac{14}{264}$ which he already owned, or $\frac{25}{264}$ in all; that since the deed from Horatio to Charles in 1851, no devise or deed assumes to give any greater interest than Charles had, and that the petitioner's title (apart from adverse possession or estoppel, or such facts outside of the records) is to only $\frac{23}{264}$; but that within the meaning of St.

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1893, c. 340, he had a record title to $\frac{255}{264}$; and that, as to $\frac{9}{264}$, the petitioner had no record title whatever, and did not come within the statute.

H. M. Williams, for the petitioner.

KNOWLTON, J. This case is reported for our consideration by a justice of this court, and the only question in it is whether the petitioner has a record title to the whole estate within the meaning of St. 1893, c. 340, § 1.

It is found that, by the true construction of the will of Sarah Davis who died in 1847, the shares which Charles Davis and Horatio Davis took under it in the real estate in question were such as to make their interest in 1851, including portions which they inherited from others, $\frac{123}{264}$ each. In that year Horatio Davis made to his brother Charles a warranty deed of one half of the premises, which was duly recorded. That made Charles the real owner of $\frac{246}{264}$, and by deed and inheritance the ostensible owner of $\frac{255}{264}$. From that time until his death in 1888, a period of thirty-seven years, Charles Davis was in actual, open, and continuous adverse possession of the share of the premises belonging to his co-tenants, and he acquired an impregnable title by disseisin. This title passed by devise to his children. One of these children made a quitclaim deed of his share to the others, and on December 15, 1894, they united in a quitclaim deed to the petitioner. Both of these deeds were duly recorded. The grantors in these deeds had in fact a good right to convey, and the question is whether the quitclaim deed gave the petitioner a record title to the whole estate.

In *Pray* v. *Pierce*, 7 Mass. 381, and in *Russell* v. *Coffin*, 8 Pick. 143, it was held that a deed of release given for a valuable consideration will operate as a bargain and sale, or other lawful conveyance, by which an estate might pass. The principle of these decisions was afterwards embodied in our statutes, (Rev. Sts. c. 59, § 5, and Gen. Sts. c. 89, § 8,) and now appears in the Pub. Sts. c. 120, § 2, in these words: "A deed of quitclaim and release shall be sufficient to convey all the estate which could lawfully be conveyed by a deed of bargain and sale." Under this statute, upon the facts found, the petitioner acquired a fee simple by the deed in question. In *Woodward* v. *Sartwell*, 129 Mass. 210, it was held that a quitclaim deed describing land by

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metes and bounds was good as against prior unrecorded encumbrances created by the grantor. The rule stated in *Adams* v. *Cuddy*, 13 Pick. 460, was also explained and limited. In *Nealon* v. *Henry*, 131 Mass. 153, 156, it was decided that a tender of a deed required by law may be made by a quitclaim deed, because "a deed of quitclaim or release conveys the estate of the grantor as effectually as a deed of warranty." In *Mansfield* v. *Dyer*, 131 Mass. 200, it was held that property fraudulently conveyed can be held against the creditors of the grantor by an innocent purchaser under a quitclaim deed from the fraudulent grantee.

The case at bar is clearly distinguishable from *Arnold* v. *Reed*, 162 Mass. 438. In that case, the grantor in the deed purported to be selling the property of another. It was decided that, to make a record title within the meaning of the statute, the record should show an apparent authority in the attorney or agent otherwise than by a mere recital by the grantor in the deed, and it was intimated that this rule would not apply to a deed in which one purports to sell his own land.

We are of opinion that the petitioner shows a record title to the whole property. *Decree for the petitioner.*

FRANK L. BURT *vs.* IDA L. BURT.
IDA L. BURT *vs.* FRANK L. BURT.
SAME *vs.* SAME.

Suffolk. November 13, 1896. — March 30, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Divorce — Statute — Evidence — "Drunkenness from the Excessive Use of Opium or other Drugs."

At the trial of a libel for divorce under the St. of 1889, c. 447, for gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs, witnesses, some medical and others not, but who have been with the libellee for a long period of time and were familiar with her habits as to the use of morphine and its effects upon her, may state that, in their opinion, at various times when they saw her, she was under the influence of morphine.

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A decree in a libel for divorce based on a construction of the St. of 1889, c. 447, as to divorces in case of gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs, to the effect that the libellant would be entitled to a decree if, at any time after the statute was in force, the libellee was in the condition set forth in the statute, although the gross character of the use of the drug had become modified or had ceased when the libel was brought, is erroneous.

THE FIRST CASE was a libel for divorce, brought by the husband against the wife, for causes stated in the opinion. THE SECOND CASE was an appeal by the husband from the Probate Court, on the petition of the wife for separate support and maintenance. THE THIRD CASE was a libel for divorce brought by the wife against the husband, for the causes of adultery, cruel and abusive treatment, and a failure to provide suitable maintenance.

Trial in the Superior Court, before *Braley*, J., who ordered a decree *nisi* for the husband in the first case, and dismissed the petition for separate support in the second case, and the libel in the third case; and Ida L. Burt alleged exceptions. The facts appear in the opinion.

F. E. H. Gary, for Ida L. Burt.

C. W. Bartlett & E. R. Anderson, for Frank L. Burt.

LATHROP, J. The libel in the first case is brought under the St. of 1889, c. 447, which was approved on June 7, 1889, and, under the Pub. Sts. c. 3, § 1, took effect on the thirtieth day next after the day of approval. It reads as follows: "A divorce from the bond of matrimony may be decreed for gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs." This act was probably passed to supplement the provision in the Pub. Sts. c. 146, § 1, where, among other causes of divorce, is mentioned "gross and confirmed habits of intoxication." It was held in *Commonwealth* v. *Whitney*, 11 Cush. 477, that evidence of habitual intoxication from the use of chloroform would not sustain a complaint under the Rev. Sts. c. 143, § 5, charging a person with being a common drunkard. So, too, the term "habitual intemperance" in the divorce law of Connecticut, (*Barber* v. *Barber*, 14 Law Rep. 375,) and the term "habitual drunkenness" in the divorce law of Missouri, have been held not to apply to the effect caused by opiates. *Dawson* v. *Dawson*, 23 Mo. App. 169.

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A question of evidence may first be considered. Certain witnesses, some medical and others not, but who had been with the libellee for a long period of time, and were familiar with her habits as to the use of morphine and its effect upon her, were allowed to state that, in their opinion, at various times when they saw her she was under the influence of morphine. We see no reason why this exception should not be overruled. The cases relied on by the counsel for the libellee differ widely from the case at bar. In *Batchelder* v. *Batchelder*, 14 N. H. 380, and in *Golding* v. *Golding*, 6 Mo. App. 602, it was held that witnesses could not testify in general terms that a man was an habitual drunkard, because this was the very point which the court was to decide, and their testimony must be limited to a statement of the facts observed. In the case at bar the witnesses were not asked whether the libellee was a gross and confirmed drunkard owing to the use of opium or other drugs, but were asked whether at certain times she was under the influence of morphine. It must be assumed that the medical men were qualified as experts, as nothing appears to the contrary, except the statement in the bill of exceptions that the libellee objected on the ground that they were not qualified to testify as experts. Nothing appears in the exceptions to support this objection. As to the witnesses who were not medical men, as it appears that they had been with the libellee for a long time, and were familiar with her habits, and the effect of morphine upon her, there is no reason why they should not have been permitted to state their opinion as to whether she was under the influence of morphine at particular times. Whether a person is drunk is a question which a person not an expert is competent to answer, as this is something which may fairly be considered to be a matter of common knowledge and observation. *People* v. *Eastwood*, 4 Kernan, 562. *State* v. *Huxford*, 47 Iowa, 16. While this does not wholly apply to a case of drunkenness produced by drugs, yet, if a person has seen many times a certain condition resulting from the use of a certain drug, there can be no objection to his giving his opinion, when he finds the same condition existing, that it is caused by the same drug.

The principal question in the case is whether the judge was justified in entering a decree *nisi*, on his findings of fact in favor

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of the libellant. Under the terms of the statute there must not only be a use of morphine, but this use must be excessive, and must cause gross and confirmed drunkenness. Precisely what the Legislature intended by the word "drunkenness" in this connection we do not know, but we assume either that morphine produces a state of exhilaration and subsequent coma similar to that produced by the excessive use of alcoholic liquors, or that it produces other deplorable effects as detrimental to the marriage relation as those caused by alcoholic liquors.

The parties to the case were married on September 22, 1885, and lived together in Boston until about August 20, 1892, when the libellee left her home, and went to Concord Junction, where she has since lived apart from her husband. The libel was filed on November 13, 1893.

The judge found the following facts. At the time of her marriage the libellee used morphine to some extent, but the use was not gross or confirmed. The libellant knew this before the marriage, as he had prescribed it for her to relieve severe headaches. After her marriage her use of the drug increased, until the habit became confirmed, and to such an extent as to cause her to lie in bed at times until four o'clock in the afternoon. It also caused her to act in a stupid, irrational way, and this for long periods of time. After she left her husband, her use of morphine became less; and from that time up to the filing of this libel, nearly fifteen months, the gross character of its use became modified, or ceased; but she did not entirely abandon its use, and was somewhat under its influence.

We are of opinion that these findings did not warrant the decree which was entered for the libellant. We may infer from the findings that the use of the drug was gross and confirmed at some time after the St. of 1889, c. 447, took effect; and that the decree is not open to the objection that it was based on facts existing prior to the statute. Divorce statutes generally have been held not to be retrospective. *Greenlaw* v. *Greenlaw*, 12 N. H. 200. *Sherburne* v. *Sherburne*, 6 Greenl. 210. *Buckholts* v. *Buckholts*, 24 Ga. 238. *Scott* v. *Scott*, 6 Ohio, 584. *McCraney* v. *McCraney*, 5 Iowa, 232. *Giles* v. *Giles*, 22 Minn. 348.

We do not wish to be understood as saying that evidence of the use of the drug by the libellee before the statute took effect

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would not be admissible in evidence, in the discretion of the court, but the substantive fact to be proved is the condition set forth in the statute, after it took effect.

The decree which was entered, in view of the finding of the libellee's use of the drug after she left her husband, seems to be based upon this construction of the statute, namely, that the libellant would be entitled to a decree if, at any time after the statute was in force, the libellee was in the condition set forth in the statute, although the gross character of the use of the drug had become modified or had ceased when the libel was brought. We are of opinion that this view is erroneous. "Gross and confirmed drunkenness" is a condition, just as what is called in the Pub. Sts. c. 146, § 1, "gross and confirmed habits of intoxication" is a condition. Substantially the same rules apply to both descriptions. Drunkenness cannot fairly be said to be gross and confirmed if, at the time the libel is filed, the character of the use of the intoxicant or drug has ceased for some length of time, so that it may fairly be found that the condition required by the statute no longer exists. The statute does not authorize a divorce on account of the use of a drug, but only for its abuse. The use must be excessive, and must produce a certain result; and this result must exist when the libel is filed.

We find no authorities precisely in point; but there are many under the statutes of other States, where a divorce is authorized for habitual drunkenness, or habitual intemperance, which seem to us to lead to the conclusion at which we have arrived. See Nelson on Div. & Sep. §§ 350–359, and particularly § 356.

We are of opinion, therefore, in the first case, that the exceptions must be sustained.

In the other two cases, nothing appears in the exceptions to show that the findings of the judge and the decrees entered by him were erroneous. In these cases the exceptions must be overruled.

So ordered.

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A. M. McPHAIL PIANO COMPANY *vs.* BENJAMIN F. MESERVEY.

Suffolk. November 16, 1896. — March 30, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Indemnity Bond — Action — Defence.

In an action against the surety on a bond conditioned that it was to become void only in case the principal should, within nine months after notifying the plaintiff, or the plaintiff notifying the principal, of a desire to close the account between them, pay the balance due the plaintiff, or any notes given in settlement of the account, the action having been brought more than nine months after the plaintiff notified the principal of a desire to close the account, it is no defence that the surety was not notified of such desire.

CONTRACT, upon a bond executed to the plaintiff by M. C. Meservey as principal, and by the defendant as surety, and conditioned that, whereas the principal had or might purchase pianos of the plaintiff, if the principal should, within nine months from the time he notified the plaintiff or the plaintiff notified him of a desire to close the account, pay any balance due the plaintiff, or any notes which he might have given in settlement for any pianos purchased of the plaintiff, the obligation was to be void.

At the trial in the Superior Court, before *Hammond*, J., the defendant asked the judge to rule that the plaintiff was bound to notify the defendant of its desire to close the account with the principal; and that the defendant was not liable in an action upon the bond until nine months after such notification had been given. The judge declined so to rule, and directed the jury to return a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

T. I. Hogan, for the defendant.

C. F. Choate, Jr., for the plaintiff.

LATHROP, J. The defendant contends that at the time the action was brought no liability on his part as surety had arisen. By the condition of the bond in suit it was to become void only in case the principal on the bond should, within nine months after notifying the plaintiff, or the plaintiff notifying the principal, of a desire to close the account between them, pay the

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balance due the plaintiff, or any notes given in settlement of the account. There is nothing in the condition of the bond in regard to notifying the surety of a desire to close the account. The suit was brought more than nine months after the plaintiff notified the principal of a desire to close the account; and so far as the terms of the bond are concerned, there is no defence to the action.

The defendant offered to prove that, at the time he sent the bond with his signature, he wrote a letter to the plaintiff in which he said, "I want you to notify me of all purchases made and the conditions of the same, so that I may know exactly my liability"; that on the next day the plaintiff answered this by writing, "We will keep you posted as to what is done, and believe that we need not trouble you in the least by the business that we shall do"; that subsequently the bond was returned to the defendant to have the date written in; and that the defendant was afterwards notified of all the business transacted between the plaintiff and the principal, but was not notified of the plaintiff's desire to close the account nine months before suit was brought.

The short answer to this contention is, that, even if the letters, being written before the bond was finally delivered, could be admissible in evidence, the defendant merely requested the plaintiff to notify him of all purchases made and the conditions of the same, and this request was complied with. No further request was made.

The ruling of the court below was therefore right; and the order must be,

Exceptions overruled.

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LAWRENCE J. BARNARD *vs.* WILLIAM F. SCHRAFFT.

Suffolk. January 26, 1897. — March 30, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Personal Injuries — Due Care — Master and Servant — Assumption of Risk.

An employee who, while engaged in removing a kettle full of melted sugar from a furnace, is injured by the sugar spilling upon his hands while he is trying to disengage himself from a ring of the furnace which has clung to the kettle and then fallen to the floor, cannot maintain an action for his injuries, if the risk was obvious, the elements of danger were known by him, and he was lacking in due care either in failing to take notice that the ring might come off with the kettle, or that in point of fact it had so come off in this instance.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. Trial in the Superior Court before *Lilley*, J., who ruled that upon all the evidence the plaintiff could not recover, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

E. Lowe, for the plaintiff.

J. Lowell, Jr., for the defendant.

ALLEN, J. According to the testimony introduced by the plaintiff, there were in common use in candy manufactories two kinds of furnaces for melting sugar, one kind being the ring furnace, which had been in use in the defendant's factory till about six weeks before the accident; the other kind being the Fobes-Hayward furnace, which was not used nor adapted for use with rings. The furnace in use at the time of the accident was one of the latter kind, and had been purchased about six weeks before the accident, and had been in use after that time. The plaintiff had worked at the candy business thirty years, and about three years for the defendant; and had worked on the Fobes-Hayward furnace in question every day during the six weeks before the accident. This furnace had no rings which belonged to it, and was not adapted for use where kettles of different sizes were required; but in the defendant's business it was necessary to use kettles of different sizes, and accordingly the defendant's son told the plaintiff to use the rings from the old furnaces, and the plaintiff selected from the old rings one

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adapted to the kettle in use at the time. In removing the kettle full of melted sugar from the furnace, the ring clung to it. This was not observed by the plaintiff, and shortly afterwards the ring fell to the floor at his feet. The plaintiff got entangled in it, and in trying to escape or disengage himself from the ring, the sugar was spilled on his hands, and burned his right hand very badly.

The plaintiff's counsel stated at the trial that the furnace and ring were not safe and suitable appliances, because the ring, being placed on top of the furnace, and not fitted or grooved into the top as in a proper ring furnace, was not properly fastened down; and that in proper ring furnaces the rings are held in place, not only by their own weight, but by being closely fitted to the furnace top, and by the expansion of the iron when heated.

Assuming this to be so, the only danger from using the furnace and the ring was that the ring would cling to the kettle, and come off with it when the kettle should be removed. That this might happen was obvious. There was nothing to prevent it except the weight of the ring. No doubt, more care was required in using this furnace with the ring simply placed on top of it than in using a furnace with rings so adjusted as to be securely held in place. But the conditions were all well known to the plaintiff. The ring was selected by himself, and laid upon the top of the furnace. There was no concealed or latent peril. The plaintiff knew that there was nothing to hold the ring down except its own weight. He was, moreover, a candy maker of long experience, and had been at work upon this particular furnace every day for six weeks. The risk, such as it was, was obvious. The ring came off with the kettle, and the plaintiff did not notice it; and thus the accident happened.

The plaintiff testified that he did not know or understand that there was any danger of injury to himself until after he was injured. But the elements of danger were known by him, and we are of opinion that he was lacking in due care, either in failing to take notice that the ring might come off with the kettle, or in failing to observe that in point of fact it had so come off in this instance. *Goldthwait* v. *Haverhill & Groveland Street Railway*, 160 Mass. 554. *Connors* v. *Morton*, 160 Mass. 333.

Exceptions overruled.

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MARY A. SMITH *vs.* BOSTON AND MAINE RAILROAD RELIEF ASSOCIATION.

Suffolk. March 2, 1897. — March 30, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Beneficiary Association — "Family" — Designation of Beneficiary — Finding in Favor of Widow living separate.

Under St. 1882, c. 244, § 1, authorizing a corporation to apply property for the relief of its members and their "families," a member's sister, who was not dependent upon him and was not living with him, is not a member of his family, within the meaning of the statute.

Where the last designation of a beneficiary in a certificate of membership in an association fails, a previous designation of another beneficiary remains in force, if valid.

In an action upon a certificate of membership issued by a beneficiary association authorized by statute to apply property for the relief of its members and their "families," if a finding is made in favor of the widow of the member, who was living separate from him, it will be assumed by this court that the separation was a simple living apart without change in the legal relation.

CONTRACT, to recover the sum of $1,000, alleged to be due under a certificate of membership issued by the defendant association to one James W. Merrill. Upon the petition of the defendant, Annie C. Merrill, the widow of James W. Merrill, was admitted as a claimant of the funds in its hands.

At the hearing in the Superior Court, before *Maynard*, J., without a jury, the following facts were agreed. James W. Merrill is deceased, and at the time of his decease was a member of the defendant corporation in good standing. The plaintiff is a sister, and the claimant is the wife of the deceased, living separate and apart from him. The certificate was originally made out to the plaintiff on March 1, 1885, the deceased being then a widower. Subsequently he married the claimant and surrendered the original certificate and procured one in lieu thereof, wherein the claimant was named as beneficiary. Afterwards he and the claimant separated, and he thereupon surrendered the certificate in which she was named as beneficiary, and in lieu thereof took out the one now in suit in which the plaintiff is named as beneficiary.

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The defendant corporation was formed under St. 1882, c. 244, and no other statute is applicable thereto.

In addition to the above facts, the judge made the following finding: "I find as a fact that the plaintiff was neither a member of his [the deceased] family nor was dependent upon him at the time any of said certificates were issued, or during the time they were in force."

Upon the above facts, the judge found for the claimant; and the plaintiff alleged exceptions.

S. K. Hamilton, for the plaintiff.

D. N. Crowley, for the claimant.

HOLMES, J. The defendant was organized under St. 1882, c. 244, and it is agreed that no other statute applies to it. By § 1 of that act the corporation is authorized to receive and apply property "for the improvement and benefit of its members, and for the relief of its members and their families in case of sickness, injury, inability to labor, or other cases of need." We think it fairly plain that the words "their families" have in view primarily persons living with the member and dependent upon him for help in their support. As the court finds that the plaintiff, the member's sister, was not dependent upon her brother, and, as we understand it, was not living with him, we are of opinion that she was not a member of his family. *Tyler* v. *Odd Fellows' Mutual Relief Association*, 145 Mass. 134. *Elsey* v. *Odd Fellows' Mutual Relief Association*, 142 Mass. 224.

The last designation failing, the previous one remains in force if valid. *Elsey* v. *Odd Fellows' Mutual Relief Association*, 142 Mass. 224. *Marsh* v. *American Legion of Honor*, 149 Mass. 512, 515. *United Order of the Golden Cross* v. *Merrick*, 163 Mass. 374.

The only doubt is whether the previous beneficiary, the member's wife, lost her rights by the separation between her and her husband. In view of the finding in her favor, we take the separation to have been a simple living apart, without change in the legal relation of the parties. We assume that such headship and unity of person as is left to husbands by our statutes still remained to the man. For all that appears, he still contributed to his wife's support. We cannot say that the finding was wrong.

Exceptions overruled.

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MARGARET M. RYAN, administratrix, *vs.* NORTH END SAVINGS BANK.

Middlesex. March 3, 1897. — March 30, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Withdrawal by Guardian from Bank of Funds due to his Ward as Administrator.

A guardian has no authority to withdraw from a bank funds due to his ward as administrator of an estate, and it is immaterial that at the time when the guardian withdrew the funds there were no known debts due from the estate, and that the ward was the sole distributee. Even if the time for proving debts has elapsed, the guardian cannot intermeddle with the estate, but is bound to wait until it is handed over to him by an administrator.

CONTRACT to recover a deposit in the defendant bank. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, upon agreed facts, in substance as follows.

The plaintiff, who was the daughter of Catherine J. Ryan, and her only heir at law, was appointed administratrix of her estate on July 24, 1894. At the time of her death said Catherine had a deposit in the defendant bank, which, with the dividends that had accrued thereon, amounted on July 1, 1895, to $981.74, and at the date of the writ would have amounted to $1,001.36 if nothing had been withdrawn. There were no known debts due from the estate of said Catherine at the time of the withdrawal of the deposits hereinafter set forth, except the funeral expenses, which had been paid by the plaintiff from her individual resources, and the plaintiff had presented no charges for administration. In February, 1895, the plaintiff was adjudged insane, and one James F. Ryan was appointed her guardian. He filed an inventory, and the above deposit was included. The plaintiff was discharged from guardianship on January 28, 1896, and the guardian was removed on March 10, 1896. This action was brought on May 12, 1896. The plaintiff never withdrew any portion of the deposit, or made any transfer thereof. On October 19, 1895, the guardian withdrew from the deposit $500, on November 4, 1895, $100, and on November 14, $200. The money

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withdrawn was not used for the benefit or support of the plaintiff. After the removal of the guardian and the discharge of the plaintiff from guardianship, and prior to the date of the writ, the plaintiff made demand on the defendant bank as administratrix of her mother's estate for the amount of the deposit as it had stood when the guardian was appointed, with accrued dividends thereon, and produced the deposit book; but the defendant refused to make payment. If the bank was authorized to pay the amounts withdrawn to the guardian, then the amount due the plaintiff at the date of the writ was $185.36.

J. F. Sullivan, for the defendant.

W. B. Stevens, for the plaintiff.

HOLMES, J. The plaintiff's guardian collected money due from the defendant to the plaintiff as administratrix of her mother's estate. The plaintiff and defendant are both innocent, and the question is which must suffer by this wrong act of a third person. In such cases, where there is no superior equity on either side, the answer often may depend upon technical considerations. The relation of guardian and ward of itself between James Ryan and the plaintiff gives the defendant no superior equity, and if the case stopped there it would be enough to say that a guardian has no authority to receive money due to his ward in a representative capacity as executor or administrator. It is argued, however, that the defendant's position is bettered by the facts that at the time when the guardian withdrew the funds there were no known debts due from the estate which the ward was administering, and that the ward was the sole distributee. But even if the time for proving debts had elapsed, which it had not, the guardian would have had no authority to intermeddle with the estate, but would have been bound to wait until it was handed over to him by an administrator, so that the defendant's case would not have been improved. It is not like those instances in which money has been paid to the party beneficially entitled to the fund at the moment, instead of to the party formally entitled to it in some fiduciary capacity. It is a payment to a person whose claim in any case is purely formal and not beneficial, so that when the formal right fails all justification for the payment is gone.

Judgment for the plaintiff.

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JOHN M. KANZ *vs.* DANIEL S. PAGE & another.

Suffolk. March 4, 1897. — March 30, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Assumption of Risk — Action.

An action cannot be maintained, either at common law or under the employers' liability act, St. 1887, c. 270, for injuries caused by a piece of iron falling upon the plaintiff's head from the ceiling of the engine room in the defendant's factory, where a fly wheel had exploded, the plaintiff having been sent into the room by the defendant's superintendent to clear out the rubbish after the explosion.

TORT for personal injuries occasioned to the plaintiff, while in the defendants' employ, by the alleged negligence of the defendants and their superintendent. Trial in the Superior Court, before *Bishop*, J., who, at the defendants' request, ruled that the plaintiff could not maintain the action, and directed the jury to return a verdict for the defendants; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

F. J. Daggett & G. P. Wardner, for the plaintiff.

A. H. Wellman, (*G. C. Dickson* with him,) for the defendants.

HOLMES, J. This is an action for personal injuries caused by the fall of a piece of iron upon the plaintiff's head from the ceiling of a room in the defendants' factory. There are counts at common law and under the employers' liability act, but in the view which we take of the case nothing turns upon the distinction. The facts were that a fly wheel had exploded in the engine room, and the plaintiff was sent into the room to clear out the rubbish. We assume that this order was given by the defendants' superintendent, and that the defendants knew that the plaintiff was there. The defendants also knew the shattered condition of the room, which was obvious, but did not know that there was any iron likely to fall from the ceiling. While the plaintiff was at work, the iron fell upon him. The plaintiff's position is that it was the defendants' duty to examine the place more fully than they had done before sending him in there, and that the plaintiff had a right to rely to some extent upon their

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or the superintendent's having done so before sending him to work.

We are of opinion that the principle referred to does not apply to the case. Obviously there are limits to the duty of employers to provide for the safety of their workmen, — limits set by what is practicable in a commercial sense, and limits set by what naturally is to be expected under the circumstances. The chief sphere of the duty is in the permanent or recurring conditions of the machinery or the place where the workman is employed, so far as it is under the employer's control, where the danger is not obvious or necessarily incident to the business. An extreme example is *Burgess* v. *Davis Sulphur Ore Co.* 165 Mass. 71. But there are many momentary dangers which, though hidden, it is impracticable to guard against by inspection, and for which on this ground the employer is held not liable. *Whittaker* v. *Bent*, 167 Mass. 588. There are others which, even if permanent conditions of the business, are obvious without warning, and of which the workman must take the risk if he accepts employment there. *Leary* v. *Boston & Albany Railroad*, 139 Mass. 580, 587. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135. There are others which are both transitory and obvious, or at least equally easy to be discovered by employer and employed. When a room has been shattered by an explosion, it is plain to everybody that things are not in their normal condition, that the usual support of part by part has been shaken or interfered with, and that some portion may have been weakened to the point of being ready to fall. If the explosion was of an iron wheel, it is plain that the fragments probably have flown in different directions, and that they may have lodged above or below. When a workman is sent into such a room on the day of the explosion to clear away the ruins, it is manifest that he is taking one of the steps which are necessary to disclose just what has happened. It is not a natural inference on the part of one so sent that the place has been inspected, and it is not a natural interpretation of the offer to take it as implying that the superior knows that it is safe. Such an inference and interpretation are not based on the experience of life; they are mere deductions from the letter of an inaccurately stated rule of duty assumed beforehand to cover

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the case. Some one must be first in the place of possible danger. The workman sent in to clean it up has no right to assume that he is not the first, nor is the employer bound in formal language to notify him that no one as yet has made certain that nothing will give way. *Exceptions overruled.*

FREDERICK M. YOUNG, administrator, *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. March 9, 1897. — March 30, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Loss of Life — Railroad — Master and Servant — Negligence — Action.

An action cannot be maintained against a railroad corporation for causing the death of a conductor of a freight train in its employ, in consequence of the breaking apart of the train owing to a defective link, in the absence of evidence that the corporation failed to supply all the links that were needed for coupling the cars at the place where the train was made up.

TORT, by the administrator of the estate of Lester N. Young, for causing his death. Trial in the Superior Court, before *Fessenden*, J., who, at the defendant's request, ruled that the evidence would not warrant a verdict for the plaintiff, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

S. A. Fuller & C. H. Blood, for the plaintiff.

T. Hunt, (*S. Lincoln* with him,) for the defendant.

KNOWLTON, J. We may assume in favor of the plaintiff that there was evidence from which the jury might have found that his intestate was in the exercise of due care. If we assume, without deciding, that a liability under St. 1887, c. 71, of the laws of New Hampshire,* could be enforced in this Com-

* The material portions of this statute are as follows:

"Section 1. When the death of a person is caused by a wrongful act or neglect of another, which, if death had not ensued, would have entitled the person injured to recover damages therefor, then, on the death of such person, his executor or administrator may, after notice and by suit as hereinafter pro-

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monwealth under the doctrine stated in *Higgins* v. *Central New England & Western Railroad*, 155 Mass. 176, we come to the question whether there was evidence of negligence on the part of the defendant.

The accident happened in New Hampshire, and as the statutes of 1887, c. 270, and 1893, c. 359, have no extra-territorial force, they cannot be invoked by the plaintiff. The plaintiff's intestate was killed in consequence of the breaking apart of a freight train, and there was evidence that at the point of separation "there was an old, rusty link, about three quarters of it on one side had rusted, — and old rust, from six to seven months old, — and the other was a new break." The negligent use of this link is the only fault charged against the defendant. The question is whether this was negligence of officers or agents, for which the corporation is liable to an employee, or negligence of a servant for which the defendant is not liable to his fellow servant. One of the witnesses called by the plaintiff testified that the defendant furnished a sufficient number of links for use in making up this train, and that at the time of the accident there were spare links in the caboose and on the engine, and that it was the duty of the plaintiff's intestate, who was the conductor of the train, to see that there was a supply of links on his train. Another of his witnesses testified that he did not know that a conductor had any duty to have spare links on his train, but that the defendant had a sufficient number of links for use at Nashua, where the train was made up. There was no evidence that the company failed to supply all the links that were needed for coupling

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vided, recover damages for the injury to the person and estate of such person caused by such wrongful act or neglect and consequent death, and although the death is caused under such circumstances as amount, in law, to felony. . . .

"Section 2. Suit shall not be brought for such injuries unless the person injured, or his administrator or executor, shall, within sixty days after such injury is sustained, give notice in writing, under oath, to the person, persons, or corporation causing the injury by his, their, or its wrongful act or neglect, setting forth in such notice the time when and the place where such injuries were sustained, and the cause of such injuries. . . .

"Section 3. Suit may be brought for such injuries at any time after such notice, and within two years from the date of such notice, and not afterwards; and in no case shall a greater sum than seven thousand dollars be recovered."

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its cars at the places where the trains were made up. These links are not permanently fastened to the cars, but may be taken out and put in by the hand as trains are divided or made up. They are furnished for use by train men, and by those who make up the trains in the freight yards. These men are fellow servants of the conductors of freight trains. In *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13, is the following language: "Upon the undisputed evidence, the men who made up the train could easily have got a longer pin in the yard, or from the caboose which was going with the train. When proper pins for the coupling of cars were supplied, the failure to use them properly, or to replace one too short by a longer one, was the fault of the defendant's servants who used them, and not of the defendant. . . . The fact that a freight train broke apart when it ought not to is some evidence of negligence for which the railroad would be liable in a suit brought by one who is not an employee. But if nothing more appears, it does not indicate negligence of the corporation for which it is liable to one of its servants, as distinguished from negligence of a servant for which it is not liable to another servant. In a case like the present, where the only culpable cause to which the accident can be ascribed is the use of too short a coupling pin on a car of another corporation, it points to negligence of a fellow servant quite as much as to the negligence of the corporation itself." With the substitution of the word "link" for "coupling pin," this language is applicable to the present case. See also *Carroll* v. *Western Union Telegraph Co.* 160 Mass. 152; *Allen* v. *G. W. & F. Smith Iron Co.* 160 Mass. 557; *Johnson* v. *Boston Tow-Boat Co.* 135 Mass. 209; *Rice* v. *King Philip Mills*, 144 Mass. 229; *McGee* v. *Boston Cordage Co.* 139 Mass. 445.

The evidence does not show that the law of New Hampshire differs from that of Massachusetts in this particular.*

Exceptions overruled.

* The following decisions were put in evidence by the plaintiff: *Hanley* v. *Grand Trunk Railway*, 62 N. H. 274; *Nash* v. *Nashua Iron & Steel Co.* 62 N. H. 406; *Fifield* v. *Northern Railroad*, 42 N. H. 225.

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COMMONWEALTH *vs.* DAVID CROWLEY & another.

Suffolk. March 29, 1897. — March 30, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Criminal Law — Verdict — Motion in Arrest of Judgment.

A verdict of guilty of an assault with intent to commit larceny, rendered at the trial of an indictment under Pub. Sts. c. 202, § 26, which cannot be supported in its full extent, is not wholly invalid, but the defendant may properly be sentenced for an assault and battery, which is well charged in the indictment.

MOTION in arrest of judgment upon a verdict rendered at the trial of an indictment under Pub. Sts. c. 202, § 26. After the former decision, reported 167 Mass. 434, ordering the defendants to be sentenced for the offence of assault and battery, they moved in the Superior Court that the judgment be arrested for the following reasons:

"1. The indictment never properly charged the full offence under Pub. Sts. c. 202, § 26, confining with intent, etc., and the defendants were not acquitted of that offence, as the verdict of the jury would not constitute a good plea of 'autrefoit acquit' in another trial of the same indictment for the same crime.

"2. Since the only offence well charged in the indictment is assault and battery, it is obvious that they could never have been legally convicted of the full offence under Pub. Sts. c. 202, § 26, and that being so, they were never acquitted of the full offence.

"3. The verdict of the jury cannot be severed into different parts, and the verdict as to Crowley and Green must be taken as a clear acquittal of everything well charged in the indictment, and the verdict as to the second and third counts are ineffective and are dehors the record.

"4. The crime of confining was not well charged in the indictment, and the verdict of 'Not guilty,' first count, must be construed to be an acquittal of everything contained in the indictment, as a verdict of 'Not guilty' cannot be severed.

"5. By the ordering of a sentence of simple assault and battery, and thereby eliminating the 'assault with intent to commit

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larceny' from the verdict, the verdict in this case is vacated, and the court on the record has no right or authority to sentence.

"6. The verdict of the jury is repugnant, inconsistent, ambiguous, and defective in every particular, and no judgment or sentence can be rendered upon it."

This motion was overruled; and the defendants appealed to this court.

F. F. Sullivan & J. M. Sullivan, for the defendants.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

ALLEN, J. The defendants rely, in support of their new motion in arrest of judgment, upon *Crain* v. *United States*, 162 U. S. 625; but we find nothing in that decision which touches the objections presented by the present motion.

We heretofore held that the verdict was properly received and recorded. The defendants were not convicted of the full offence with which they were charged, and the verdict of guilty which was rendered could not be supported in its full extent; but it included a smaller offence which was well charged, and for which they might properly be sentenced under the indictment. The verdict was not wholly invalid, because it included the element of an intent to commit larceny.

The other objections now taken are covered by the former decision. *Motion in arrest rightly overruled.*

JAMES S. LUDDINGTON *vs.* NATHAN B. GOODNOW.

Suffolk. March 4, 5, 1897. — March 31, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Conversion — Evidence — Right of Possession — Action — Allowance of Amendment increasing Ad Damnum in Writ.

In an action for the conversion of certain chattels which had belonged to A. and B. as copartners, the plaintiff claimed under a sale by B. of his half to A., and a later sale of the whole by A. to the plaintiff. It appeared that A. and B., upon dissolving the partnership, executed an instrument under seal, by which B. agreed that he would "not take or claim any part, share, or interest in said

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business, or interfere in any way therewith." *Held*, that evidence was admissible to show that, after the instrument was executed, A. noticed that the chattels in question were not mentioned, and spoke about it in the office of the lawyer who drew the instrument; that B. said they would have no more trouble about it; and that both agreed that there was no need of drawing the instrument over again.

A., who had bought of B. certain chattels situated in a building leased of C., took possession of them, and then let them to B. at a monthly rent, with a right to repurchase. Later B. notified A. that he was not in possession of the building. A. thereupon went to the building, which was closed, saw C. at the door, and demanded the property. C. replied that all property there belonged to B., and that he held it for unpaid rent, and advised A. to consult a lawyer. *Held*, in an action by A. against C. for conversion of the property, that the judge properly refused to rule that A. had not made out a case.

Under Pub. Sts. c. 167, § 42, it is within the power of a justice of the Superior Court, who has assessed the damages in an action for the conversion of chattels at $1,200, to allow an amendment by increasing the *ad damnum* in the writ from $1,000 to $1,500.

TORT, for the conversion of certain personal property. Trial in the Superior Court, without a jury, before *Bond*, J., who found for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. F. Kilton, for the defendant.

J. H. Blanchard, for the plaintiff.

HOLMES, J. This is an action for the conversion of certain chattels in and about the Grand Opera House in Boston. The chattels had belonged to Mansfield and Magee, copartners and lessees of the Grand Opera House. The plaintiff claimed under a sale by Magee of his half to Mansfield, and a later sale of the whole by Mansfield to the plaintiff. Mansfield surrendered the lease to the defendant, and the defendant took possession of the theatre and the property. The case was tried before a judge without a jury, and he found for the plaintiff, subject to three exceptions, which are to be considered.

1. The first concerns the purchase by Mansfield from Magee. By an instrument under seal, executed by them upon dissolving the partnership, Magee agreed that he would "not take or claim any part, share, or interest in said business, or interfere in any way therewith." Testimony was admitted under exception, that, after the instrument was executed, Mansfield noticed that the property in question was not mentioned, and spoke about it in the office of the lawyer who drew the instrument; that Magee said they would have no more trouble about it, and that both agreed that

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there was no need of drawing the instrument over again. It is objected that this was an attempt to modify the specialty by contemporaneous talk. But the testimony warranted a finding that the oral agreement was subsequent to the execution of the paper, and if the paper did not cover the property, operated by way of gift, followed as it was by possession, or of sale in consideration of Mansfield's abandoning a claim to have the instrument modified, and therefore the evidence properly was let in.

2. The next exception is to a refusal to rule that the plaintiff had not made out a case. The particulars relied on concern the plaintiff's present right of possession, and the conversion by the defendant. The plaintiff, after the sale by Mansfield to him, took possession, and then took from Mansfield an instrument by which the latter purported to hire the property at a monthly rent for a year, with a right to repurchase for seven hundred dollars. Later, Mansfield notified the plaintiff that he was not in possession of the Grand Opera House. This fairly might be found to import what no doubt it meant, a surrender to the plaintiff of Mansfield's rights under the lease. *Hardy* v. *Reed*, 6 Cush. 252. The plaintiff thereupon went to the theatre, which was closed, saw the defendant at the door, and demanded his property. The defendant seems to have answered somewhat ambiguously, but there was evidence that he said that all property there belonged to Mansfield, and that he held it for unpaid rent. It is a fair inference that, although he tried to avoid an up and down refusal and advised the plaintiff to consult a lawyer, he did refuse, in substance, to give up the goods, and asserted an adverse title of his own. The ruling asked properly was refused.

3. The judge assessed the damages at over twelve hundred dollars. This was more than the *ad damnum* in the writ, which was one thousand dollars. Thereupon the plaintiff moved to amend his *ad damnum* to fifteen hundred dollars, and this was allowed, subject to the exception and appeal of the defendant. The allowance was within the power of the judge. Pub. Sts. c. 167, § 42. *Ellis* v. *Ridgway*, 1 Allen, 501. The matter at issue was not determined by the *ad damnum*, which necessarily was conjectural, but by the allegation and denial that the defendant had converted certain chattels to his own use.

Exceptions overruled.

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WILLIAM J. REYNOLDS *vs.* GEORGE A. BARNARD.

Worcester. September 28, 1896. — April 1, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Employers' Liability Act — Law and Fact.

A temporary staging, put up by workmen engaged in slating the roof of a building, is not a part of the employer's "ways, works, or machinery," within the meaning of St. 1887, c. 270, § 1, cl. 1.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the fall of an overloaded staging upon which he was at work slating the roof of a building, it is a question for the jury whether the principal duty of the foreman in charge of the work was not that of superintendence, notwithstanding the fact that he was engaged in laying slate on the roof when the accident happened, and although he testifies, as a witness for the defendant, that he worked with his hands nine tenths of the time.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the fall of a staging upon which he was at work. The declaration contained two counts under the employers' liability act, St. 1887, c. 270, § 1, cls. 1, 2, the first count alleging, as the cause of the injury, a defect in the defendant's ways, works, or machinery; and the second count alleging, as such cause, the negligence of some person employed by the defendant and intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence. Trial in the Superior Court, before *Braley*, J., who, at the defendant's request, ruled that the plaintiff was not entitled to recover under either count of his declaration, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

The case was argued at the bar in September, 1896, and afterwards was submitted on briefs to all the justices.

J. B. Ratigan, for the plaintiff.

G. S. Taft, for the defendant.

BARKER, J. 1. The ruling that the plaintiff could not recover under the first count was right. The staging by the breaking of which he was hurt was not a part of the defend-

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ant's ways, works, or machinery, within the meaning of St. 1887, c. 270, § 1, cl. 1. The plaintiff was a slater, whose work required him to walk upon the topmost of several stagings, fastened to a roof six or seven feet below the ridgepole. The staging consisted of planks laid upon triangular brackets, each made of three pieces of wood nailed together, and fastened to the roof by a strip of zinc, one end of which was nailed to the roof and the other end to the bracket. The brackets were made as needed from pieces of refuse lumber, picked up at the building by any of the workmen who saw fit to do that part of the work, and those in use when the plaintiff was hurt had been put up on the section of the roof where he was working by other workmen, after the plaintiff himself had taken them down from another section. The staging was heavily loaded with slates, and fell by reason of the collapse of an upright forming part of one of the brackets.

As held in *Burns* v. *Washburn*, 160 Mass. 457, and in *Adasken* v. *Gilbert*, 165 Mass. 448, a temporary staging of this kind, built and put up by the workmen themselves for use upon a particular job, "is not within the term 'ways, works, or machinery,' in the statute." The staging as to which, in *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131, it was held that the jury could find it to be part of the ways, works, or machinery, was one of several permanently kept for use about the yard of a mill, and taken down and put up from time to time, and intended to be used from four days to a week at a time in each place where it was erected. The staging in the present case was of the class of appliances which in *Burns* v. *Washburn* and in *Adasken* v. *Gilbert* were held not within the statute.

2. While it cannot be said as matter of law either that the plaintiff was careless in going upon the staging, or that the danger that it would collapse was so obvious that he must be held to have taken the risk, in the opinion of a majority of the court it cannot be said, as matter of law, that the careful oversight of the work by a superintendent would not have prevented the loading of the staging with slate to such an extent as to make it dangerous. It was conceded that the defendant's son was foreman of the job, and that he had charge of it; and, in the opinion of a majority of the court, this was enough to justify

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the plaintiff in his contention that it was a question for the jury whether the principal duty of the foreman was not that of superintendence, notwithstanding the testimony that he did manual labor, and was laying slate on another section of the roof at the time of the accident. The fact that the person in charge does manual labor is not conclusive upon the question whether his principal duty is that of superintendence. *Malcolm* v. *Fuller*, 152 Mass. 160. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131, 138, 139. *O'Neil* v. *O'Leary*, 164 Mass. 387. *Crowley* v. *Cutting*, 165 Mass. 436. Nor was the testimony of the foreman himself, that he worked on the copper gutters nine tenths of the time, conclusive against the plaintiff. The foreman was called as a witness by the defendant, and the jury might have disbelieved this part of his testimony, and if so, there was nothing but the fact that he was at work slating when the staging collapsed, to show that his principal duty was not that of superintendence. This was not enough to bring the case within the doctrine of *O'Neil* v. *O'Leary*, 164 Mass. 387. While proof that the foreman worked with his hands nine tenths of the time would have brought the case within that doctrine, the question whether the testimony of the foreman, called as a witness by the defendant, constituted such proof was for the jury. *Exceptions sustained.*

MARY E. CHASE *vs.* LIZZIE S. WEBSTER, executrix.

Suffolk. December 3, 1896. — April 1, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Death of Party after Entry of Decree of Divorce nisi — Widow's Allowance.

A decree of divorce nisi having been entered, the death of either party before the decree has been made absolute and before the time when it can be made absolute puts an end to the suit, and thereafter the divorce cannot be made absolute, either by order of court or by the operation of St. 1893, c. 280, § 1.

Where the will of a testator left all his property, amounting to nine hundred dollars, away from his widow, so that, having waived the provisions of his will, she was entitled under the statute to all his property not needed for the pay-

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ment of debts and charges of administration, and it did not appear whether there were any debts, the court said that an allowance of one hundred dollars was not unreasonable, the justice who made the decree having found that the petitioner was in necessitous circumstances.

APPEAL from a decree of the Probate Court, made December 12, 1895, allowing $100 to Mary E. Chase, as the widow of William C. Chase, upon her petition, dated December 12 aforesaid, for an allowance out of the estate of her deceased husband.

The appellant, who was the executrix of the will of William C. Chase, filed the following reasons of appeal: "1. That it does not appear that the appellee is the widow of William C. Chase. 2. That the appellee was not so placed by reason of the death of William C. Chase as to entitle her, assuming her to have been such widow, to an allowance. 3. That the appellee did not stand in such relation to William C. Chase as to entitle her to a widow's allowance upon his decease."

Hearing on appeal, before *Morton*, J., who affirmed the decree of the Probate Court, and reported the case for the determination of the full court, in substance as follows.

The petitioner was lawfully married to the testator on May 24, 1891, and was the widow of the testator. For two years, or thereabouts, before the testator's death they had lived separate and apart, although he had in the meantime contributed to her support. It appeared that he gave her $200 in May, 1895, part of which, she testified, she used to pay bills with and part to pay off a mortgage upon a piano which she subsequently sold for her living. There was no testimony that he either gave her or did not give her anything more. The cause of the separation did not appear, though it was, perhaps, to be inferred. The estate consisted of about nine hundred dollars, all personal property, and there were no children. It did not appear whether there were any debts. The testator left a will by which he devised the estate entirely away from the widow, who duly waived the provisions thereof. At the time of the testator's death, and at the time of the petition and allowance and of the hearing, the widow was in necessitous circumstances. She had no income or means of support except such as she derived from her precarious way of life. It did not appear what her husband's occupation or earnings were; nor, if that is essential, that her necessi-

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tous circumstances were altogether due to his death, nor how much, if anything, the death really had to do with them. If she was entitled to an allowance, no objection was made that it was unreasonable in amount, and the judge found that it was reasonable.

The judge also found, subject to the objection of competency and materiality, that she was a dissolute woman; that at times she was intoxicated, and that she was a woman of the town, and had depended for a living upon her business as such woman for the last two years, with what her husband gave her as aforesaid. The judge further found, subject to its competency and materiality, that in May, 1895, her husband obtained a divorce *nisi* from her for adultery, which had not been made absolute at the time of his death in August, 1895. There was no evidence whether the divorce would or would not have been made absolute if the husband had lived. The respondent contended that the above evidence as to her dissolute character was competent, and that, in view of it, the petitioner was not entitled to an allowance. The judge ruled and found that, if it was competent, she was notwithstanding entitled to an allowance.

The case was argued at the bar in December, 1896, and afterwards was submitted on briefs to all the justices.

J. P. Prince, for the respondent.

H. Dunham, for the petitioner.

BARKER, J. A decree of divorce entered *nisi* does not dissolve the marriage. *Wales* v. *Wales*, 119 Mass. 89. *Graves* v. *Graves*, 108 Mass. 314. *Noble* v. *Noble*, L. R. 1 P. & D. 691. A decree *nisi* having been entered, the death of either party before the decree has been made absolute, and before the time when it can be made absolute, puts an end to the suit; and thereafter the divorce cannot be made absolute, either by order of court or by the operation of St. 1893, c. 280, § 1. The petitioner is therefore the widow of the testator.

The power to make allowances from the personal estate of a deceased person is given by Pub. Sts. c. 135, § 2, and the direction given by the statute is that the petition shall be dealt with "having regard to all the circumstances of the case," with a necessary implication that the allowance shall be given only to relieve what, under the circumstances, are fairly to be deemed

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necessities. See *Washburn* v. *Washburn*, 10 Pick. 374; *Hollenbeck* v. *Pixley*, 8 Gray, 521; *Slack* v. *Slack*, 123 Mass. 443; *Dale* v. *Hanover National Bank*, 155 Mass. 141. These cases hold that the allowance is not to be given with the design of taking the estate from creditors, or of modifying the provisions of a will, or of changing the course which property would take under the statute of distributions, and that the allowance may be given, although the widow at the time of her husband's death is living separate and apart from him; and the decisions cited say that the fact that the parties were separated, or the question which party was the culpable cause of the separation, may have little application to the question of the allowance, and that it is not made as a reward for faithful service as a wife, but is a question of the widow's actual necessities.

In the present case the allowance was of one hundred dollars only. The will of the testator left all of his property away from his widow, and his estate amounts to nine hundred dollars, so that, having waived the provisions of his will, she will take under the statute of distributions all of his property not needed for the payment of debts and charges of administration, and it did not appear at the hearing whether there were any debts. The making of the allowance is therefore not shown to have been contrary to the provisions of the statute as construed and interpreted by the decisions cited. The petitioner was found by the justice who made the decree to have been in necessitous circumstances, and entitled to the small allowance given her by the Probate Court.

The decision of a single justice of this court in a probate matter is not to be reversed unless clearly shown to be erroneous. *Allen* v. *Allen*, 117 Mass. 27, 29. *Slack* v. *Slack*, *ubi supra*. In the opinion of a majority of the court, we cannot say, as matter of law, that the circumstances were such as to make the allowance erroneous.

Decree affirmed.

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STANLEY RUFFIN, petitioner.

Suffolk. January 20, 1897. — April 3, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Discharge in Insolvency — "Creditors who have proved their Claims."

In Pub. Sts. c. 157, § 90, which provide that where a debtor has failed for certain reasons to obtain a discharge, a discharge may be granted if certain conditions therein stated are complied with, the words "a majority . . . of the creditors who have proved their claims" mean all the creditors who have proved at any time and not merely the creditors who have proved within six months after the date of the assignment.

APPEAL from a decree of the Court of Insolvency refusing the discharge of the petitioner under Pub. Sts. c. 157, § 90. Hearing before *Hammond*, J., who reported the case for the determination of this court, in substance as follows.

The only question in dispute was whether the debtor had obtained the assent of the requisite majority of his creditors as required by that section.* It appeared that he had not obtained a majority in value and number of his creditors who had proved their claims within six months from the date of the assignment, but that he had obtained a majority in number and value of his creditors who had proved their claims at the time of this application. The judge ruled that the phrase "the creditors who have proved their claims" meant only the creditors who

* The provision is as follows: "When a discharge is refused a debtor for the sole reason that the assent of the requisite majority of his creditors has not been seasonably obtained or filed, or for the reason that he has not taken the oath required by section seventy-six, the judge, upon the application of the debtor made within two years after the date of the assignment, and with the written assent of a majority, or, in case of his second insolvency, of three fourths in number and value of the creditors who have proved their claims, may grant his discharge, if he satisfies the judge on a hearing had after public notice of said application that the failure to obtain or file the assent was occasioned by accident or mistake, or other sufficient cause, and by no fault of his own; or that the omission to take the oath was owing to his inability by reason of sickness, accident, or mistake, to attend and take the same; and if he is present and takes the oath and abides and performs all lawful orders of the court."

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have proved their claims within six months after the date of the assignment, and refused on that ground alone the discharge. If the ruling was correct, the discharge was to be refused; otherwise to be granted.

F. K. Linscott, for the petitioner.

HOLMES, J. It must be assumed that the petitioner satisfied the judge "on a hearing had after public notice of said application that the failure to obtain or file the assent was occasioned by accident or mistake, or other sufficient cause," that being the express requirement of Pub. Sts. c. 157, § 90. It is stated that the only question in dispute was whether the petitioner had obtained the assent required by that section and that the judge refused the discharge on the ground of his ruling alone. It is found that if that ruling is wrong the discharge is to be granted. In our opinion the ruling is wrong. The limitation of the creditors in § 86 to those who have proved within six months is not express, but only a consequence of the requirement that the assent shall be filed within six months. The assent required by § 90 is of "a majority . . . of the creditors who have proved their claims." There are no words which expressly or by implication confine it to those who might have been asked to assent before. On the contrary the words used plainly mean all the creditors who have proved at any time. When it is shown that the failure to get the assent earlier was through accident or mistake, there seems to be no reason for denying the right to vote to a part of the creditors concerned in the question of the discharge.

Discharge to be granted.

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ALBERT MEAD *vs.* IRA E. BOWKER & trustee.

Middlesex. March 4, 1897. — April 6, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Action upon a Judgment of a Trial Justice — Statute of Limitations.

An action upon a judgment rendered by a trial justice is barred by the statute of limitations, Pub. Sts. c. 197, § 1, cl. 1, if brought after six years from the date of the judgment.

CONTRACT, upon a judgment. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

H. G. Sleeper, for the defendant, submitted the case on a brief.

F. M. Forbush, for the plaintiff.

HOLMES, J. This is a suit upon a judgment of a trial justice, brought more than six years after the judgment, and the only question is whether such a judgment is within the exception to the six years' limitation in Pub. Sts. c. 197, § 1, cl. 1, that is to say, whether it is a judgment of a court of record.

It is settled that judgments of justices of the peace are barred in six years. *Smith* v. *Morrison*, 22 Pick. 430. *Mowry* v. *Cheesman*, 6 Gray, 515. The earlier of these decisions, it is true, invoked the aid of St. 1839, c. 73, in interpreting the statute of limitations, the words of which were substantially the same then as now. Rev. Sts. c. 120, § 1, cl. 1. But the act of 1839 only purported to give two years from the date of its passage for suing upon judgments rendered by justices of the peace before the Revised Statutes went into operation, and therefore bore upon the Revised Statutes only by way of interpretation, so far as a later statute could be used for that purpose. The second decision cited applied the same rule to a judgment of a Rhode Island justice. Both of the cases necessarily were decided on the interpretation of the statute of limitations, and established that the words "court of record," as there used, did not include justices of the peace, however true it might be that for some other

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purposes they were courts of record. *Ex parte Gladhill*, 8 Met. 168, 170. *Thayer* v. *Commonwealth*, 12 Met. 9, 11.

The Revised Statutes required justices of the peace to keep a record of all their judicial proceedings, as the Public Statutes now require trial justices to do. Rev. Sts. c. 85, § 35. Gen. Sts. c. 120, § 51. Pub. Sts. c. 155, § 69. They gave them a limited exclusive original jurisdiction and power to punish for contempt. Rev. Sts. c. 85, §§ 1, 33. In short the civil jurisdiction, powers, and characteristics of justices of the peace were substantially the same which now belong to trial justices. Rev. Sts. c. 85, § 1 *et seq.* Gen. Sts. c. 120, § 1 *et seq.* Pub. Sts. c. 155, § 12 *et seq.* For trial justices are simply justices of the peace designated and commissioned to try cases. Pub. Sts. c. 155, § 7. *Maloney* v. *Piper*, 105 Mass. 233, 234. It is true that the jurisdiction and powers, first of justices of the peace, and later of trial justices, became somewhat larger than were the jurisdiction and powers of the former in the time of the Revised Statutes, but the essential characteristics have not changed. We must assume the decisions which we have cited still to be the law. No doubt the earlier one was made a good deal easier to arrive at by the implications of the act of 1839, but, however arrived at, it interprets the statute of limitations, and when the limitation of six years is interpreted to apply to judgments of justices of the peace we see no reason why it should cease to apply to such judgments because only a portion of their number now are allowed to sit as judges. The exception from the six years' limit begins with judgments of police courts. *Bannegan* v. *Murphy*, 13 Met. 251.

Judgment for the defendant.

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CHARLES A. KENNESON *vs.* INHABITANTS OF FRAMINGHAM.

Middlesex. March 10, 1897. — April 13, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Construction of Statute relating to Contagious Diseases among Domestic Animals.

The meaning of § 27 of St. 1894, c. 491, entitled "An Act to codify and consolidate the laws relating to contagious diseases among domestic animals," is that the expense of isolation of animals upon the owner's premises is to be borne by himself without payment or reimbursement, and that the expense which is to be paid by the city or town, and in part to be reimbursed by the State, is only that of keeping animals isolated upon premises other than those of the owner or person in whose possession they were found when the order of isolation was made.

CONTRACT, to recover a reasonable compensation for taking and appropriating certain property of the plaintiff, for establishing and maintaining a quarantine on the plaintiff's premises, by order of a member of the board of cattle commissioners under St. 1894, c. 491, entitled "An Act to codify and consolidate the laws relating to contagious diseases among domestic animals," and acts in amendment thereof, and also for the expense of quarantine in attending and feeding said cattle, and shipping the same from the town by order of the commissioner.

The defendant demurred to the declaration, assigning as ground therefor that it did not set forth a legal cause of action. The Superior Court sustained the demurrer; and the plaintiff appealed to this court.

J. A. McGeough, for the plaintiff.

L. H. Wakefield & W. Adams, for the defendant.

BARKER, J. Whether the demurrer was rightly sustained depends upon the meaning of St. 1894, c. 491, which the plaintiff contends gives him a right of action. He alleges, in substance, that his cattle were quarantined in his own barn in Framingham by order of a member of the board of cattle commissioners, from January 19, 1895, to June 16, 1895, when by further order the plaintiff removed them, except two, which had died, and shipped them on the cars. He seeks to recover of the

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town the sum of $2,360.38, for the expenses of the quarantine and of putting the cattle on the cars. The amount is made up of a charge of sixty-two cents a day for each beast, $2,014.38; of a man for five months, $225; use of barn, $100; and expense of shipping the cattle, $21.

The section upon which the plaintiff relies is this: "Section 27. When any animals are quarantined, collected, or isolated under the provisions of this act, upon the premises of the owner or of the person in possession thereof at the time such quarantine is imposed, the expense thereof shall be paid by such owner or person in possession, and when taken from such premises such expense shall be paid by the city or town wherein the animal is kept, and four fifths of such payment, when certified by the treasurer of the city or town, and approved by the board of cattle commissioners, shall be refunded by the Commonwealth."

The plaintiff contends that if animals quarantined upon the premises of the owner at his own expense are taken away in pursuance of law, the expense theretofore incurred is to be paid by the town. It is true that, as the law stood when the cattle were first put in quarantine, there was no provision by which the expense could be reimbursed, unless the construction for which the plaintiff contends is correct. But we think it was the intention of the statute to put upon the owner without reimbursement the expense of keeping isolated or quarantined his own cattle, which were diseased or suspected of disease, if they could be so kept upon his own premises.

The statute was a codification of the laws relating to contagious diseases among domestic animals. An examination of the statutes codified shows that section twenty-seven, so far as it relates to the expense of isolation or quarantine, has no meaning different from that of St. 1887, c. 252, § 1, or of Pub. Sts. c. 90, § 1, or of St. 1860, c. 220, § 1, which were corresponding provisions of earlier statutes. The statute last cited provided for payment by the town or city only when cattle were "taken from the possession of their owners to be maintained" in isolation. The omission of the words "to be maintained" in the re-enactment of this provision in Pub. Sts. c. 90, § 1, was merely for brevity, and did not change the meaning. The practical construction of the statutes by municipal and State officers seems

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to have been that the owner had no right of reimbursement when his cattle were isolated upon his own premises, no instance being found where such compensation has been contended for or paid. Besides this, the quarantine was ordered by a member of the board of cattle commissioners, and one provision of St. 1894, c. 491, § 45, and of St. 1893, c. 306, § 2, was, that, when a member of the board became satisfied that the public good required it, he should cause the affected animals to be isolated at the expense of the owner, or to be killed without appraisal or payment. Looking at the corresponding provisions of previous statutes, or only at those of the statute in force when the plaintiff's cattle were put in quarantine, we think the meaning of § 27 is, that the expense of isolation upon the owner's premises is to be borne by himself, without payment or reimbursement; and that the expense which is to be paid by the city or town, and in part to be reimbursed by the State, is only that of keeping animals isolated upon premises other than those of the owner or person in whose possession the cattle were found when the order of isolation was made.

One item of the plaintiff's account is for the expense of shipping the cattle at the end of the quarantine. It is enough to show that this expense cannot be recovered of the town to say that if, as seems to be true, it is not an expense of the quarantine, there is no ground for its recovery; and if it is such an expense, it cannot be recovered from the town for the reasons stated. In this connection it is to be noted that on June 5, 1895, eleven days before the day to which the plaintiff alleges the quarantine continued, another statute (St. 1895, c. 496) went into effect, by which important changes in the law relating to contagious diseases among domestic animals were made. The cattle commissioners were authorized to expend $100,000 in the year 1895, and St. 1894, c. 491, § 27, was so amended that, if cattle are isolated upon the owner's premises for more than ten days, the expense is to be paid by the Commonwealth, and that the full value of cattle condemned as afflicted with tuberculosis may, under certain circumstances, be paid to the owner. See St. 1895, c. 496, § 9. If the expense of shipping the cattle, for which the plaintiff asks payment, was incurred upon an understanding with the board of cattle commissioners that the cattle should be sent

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to the abbatoir to be appraised, killed, and paid for under the new statute, the plaintiff, if entitled to reimbursement from any source of the expense of putting them upon the cars, certainly could not ask it of the town.

Order sustaining demurrer affirmed; judgment for defendant affirmed.

HENRY P. BOWDITCH & others, trustees, *vs.* SUPERINTENDENT OF STREETS OF BOSTON.

Suffolk. November 12, 1896. — May 13, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Certiorari — Sewer — Construction of Order — Validity of Assessment — Statute.

Certiorari will lie to quash an alleged invalid assessment for the cost of a sewer, levied by the superintendent of streets of Boston, under St. 1892, c. 402, upon estates abutting on the street in which the sewer is built.

The superintendent of streets of a city was ordered by the mayor and aldermen to make a sewer in a certain street, "said sewer to be of 15 inch and 12 inch earthen pipe and located as shown on a plan on file" in his office. According to the plan a portion of the sewer was to be built of 24 inch pipe. *Held*, on a petition for a writ of certiorari to quash an assessment for the cost of the sewer, that the order and plan were to be taken together; and that there was no error on the part of the superintendent of streets, or failure to comply with the order, in building a portion of the sewer of 24 inch pipe.

The neglect of the superintendent of streets of Boston, who is ordered by the mayor and aldermen, under the authority of St. 1892, c. 402, to build a sewer in a certain street, to invite by advertisement proposals for its construction, and to take a bond or other security for the performance of the contract, as required by St. 1890, c. 418, §§ 4–6, the estimated cost of the same having exceeded $2,000, renders an assessment upon the estates abutting on the street for the cost of the sewer invalid.

The writing of "Approved" by the mayor on a letter written by the superintendent of streets of Boston asking the mayor's approval of his action in letting the contract for the construction of a sewer ordered by the mayor and aldermen to be built, under the authority of St. 1892, c. 402, and the estimated cost of which exceeds $2,000, without advertising for proposals or taking security for the performance of the contract, is not a compliance with St. 1890, c. 418, §§ 4–6; and the latter statute is not repealed by St. 1892, c. 402.

PETITION, filed July 18, 1895, for a writ of certiorari, to quash an assessment made by the respondent upon the estates

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of the petitioners on account of the construction of a sewer in Pond Street in Boston. Hearing before *Barker*, J., who reserved the case for the determination of the full court; such decree to be entered therein as justice might require. The facts appear in the opinion.

H. L. Harding, for the petitioners.

T. M. Babson, for the respondent.

MORTON, J. This is a petition for a writ of certiorari to quash certain sewer assessments made by the respondent as superintendent of streets of the city of Boston on estates of the petitioners abutting on the street in which the sewer was built.

The first question is whether certiorari lies. The respondent contends that it does not, because, first, he is an executive officer performing a purely ministerial duty in levying the assessments, and, secondly, if that is not so, because the remedy is by petition for abatement.

The assessments were made by virtue of the provisions of St. 1892, c. 402. By § 1 of that act the mayor and aldermen may order the superintendent of streets to make sewers, and he is bound to carry out the orders thus passed. By §§ 2 and 3, the expenses of the work so ordered are to be assessed to an amount not exceeding four dollars per lineal foot of sewer on the parcels of land bounding on the highway or strip of land in which the sewer is built, and the superintendent of streets is directed to apportion this assessable cost amongst these parcels in a manner therein provided. In other words, he is to determine what the assessable cost is, and then to apportion it amongst certain estates; and we think that in doing this he acts judicially, and that therefore certiorari will lie to correct any errors of law affecting the assessment. *Snow* v. *Fitchburg*, 136 Mass. 179. *Attorney General* v. *Northampton*, 143 Mass. 589.

Of the remedy by abatement it is to be said that this is not a case in which the aggrieved parties are seeking relief on the ground that the assessments are too large, or that their estates have been overvalued, or for any other like reason. They contend, on the contrary, that the assessments are wholly invalid by reason of the failure of the superintendent of streets to

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comply with certain statutory or other requirements, whose observance they insist was essential to a valid assessment. In such a case it is plain that certiorari is a proper remedy. *Butler* v. *Worcester*, 112 Mass. 541, 556. *Kelso* v. *Boston*, 120 Mass. 297. *Taber* v. *New Bedford*, 135 Mass. 162. *Snow* v. *Fitchburg*, *ubi supra*.

It is not contended, and we think that it could not be successfully, that certiorari will not lie because the assessments if paid might be recovered back in an action at law. *Barnard* v. *Fitch*, 7 Met. 605.

We come then to the question of the validity of the assessments. In considering this question, any facts stated by the respondent in his return or answer, and relied on by him, are to be taken as true so far as material, and unless it appears that substantial justice requires the writ to issue the petition should be dismissed; otherwise, it should be granted. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206, 212. *Dickinson* v. *Worcester*, 138 Mass. 555, 560. *Slocum* v. *Brookline*, 163 Mass. 23, 25. If the assessments were wholly invalid, it is obvious that justice would require that they should be quashed. So much of the answer or return as recites the action of the so called citizen's relief committee was not relied on at the hearing before the single justice, nor at the argument in this court, and we therefore treat it as waived.

The petitioners contend that the assessments are invalid because the superintendent of streets did not observe the requirements of the order of the mayor and aldermen in regard to the construction of the sewer, and because he did not comply with the provisions of certain statutes, and of the ordinances of the city of Boston; St. 1885, c. 266, § 6; St. 1890, c. 418, §§ 4, 6; St. 1891, c. 323, § 13; Rev. Ord. (1892), c. 36, § 7; which they insist were in the nature of conditions precedent to the construction of the sewer, whose non-observance vitiated the assessments.

It is contended that the order of the mayor and aldermen was violated, because the sewer was built, in part, of 24 inch pipe, and not wholly of 15 inch and 12 inch pipe, as it is insisted the order directed. Whether this point is well taken depends on the construction to be given to the order. The

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order required the superintendent of streets to "make a sewer in Pond Street, Ward 23, between May and Avon Streets; said sewer to be of 15 inch and 12 inch earthen pipe and located as shown on a plan on file in the office of the superintendent of streets marked Pond St., West Roxbury, and dated November, 1893." The reference to the plan, we think, is not merely for the purpose of showing the location, but for the purpose of showing other details as well. The plan by the terms of the order is made a part of it, and the order is to be construed as if it read "and located all as shown," etc. The plan and the order cannot be separated, but must be taken together. And the rule would seem to be, not that one should override or control the other, except perhaps in the case of a palpable clerical mistake, but that, if there are any inaccuracies or omissions in one, they should be corrected or supplied by reference to the other in order to arrive if possible at a correct description of the sewer which the mayor and aldermen had directed to be built. *Andover* v. *County Commissioners*, 5 Gray, 393. *Grand Junction Railroad* v. *County Commissioners*, 14 Gray, 553. *Gilkey* v. *Watertown*, 141 Mass. 317. According to the plan the portions to be built of 15 inch and 12 inch pipe did not include the whole sewer, but a portion was to be built of 24 inch pipe. The order did not undertake to describe the sewer fully, but left some matters to be determined by reference to the plan; and while the order only speaks of 12 inch and 15 inch pipe, we think that it is evident that, taking the order and plan together, a portion of the sewer was to be built of 24 inch pipe, and that there was therefore no error on the part of the superintendent of streets in building it as he did, or failure to comply with the order of the mayor and aldermen.

The petitioners further contend that the estimated cost of the sewer exceeded $2,000, and that the superintendent should have invited by advertisement proposals for its construction, as provided by statute and ordinance, and especially by St. 1890, c. 418, § 4; and that the contract which was made should have been accompanied by a bond or other security for its faithful performance, as required by §§ 5 and 6 of the same act. We understand the answer to admit in substance that the estimated cost exceeded $2,000. It is expressly conceded

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that proposals were not advertised for, and that the contract was let without taking any bond or other security for its performance. In respect to the neglect to advertise, it is said in the answer that the mayor gave "written authority to do otherwise," as it is provided by statute that he may. The answer is somewhat ambiguous in this particular, but on referring to the exhibits which are made a part of it, it appears that the mayor did not give a written authority to contract without inviting proposals, unless what follows constituted such authority. A letter was addressed to him by the defendant in which the latter stated, amongst other things, that he had let two contracts which exceeded $2,000, one relating to this sewer, and requested the mayor's approval of such letting, and the mayor thereupon wrote "Approved" on the letter. The question is as to the construction to be given to the statute and the effect of this action on the part of the mayor, and the failure of the superintendent of streets to take a bond. It is obvious, we think, that the object of the statute in requiring proposals to be invited by advertisement, and in compelling parties to furnish a bond or other security, is to secure a proper expenditure of the public money and to protect the taxpayer, who ultimately will be obliged to pay the expenses, from fraud and imposition in the making of contracts relating to the construction of public works. That being so, it follows that the provisions are not directory, but are in the nature of conditions precedent to the building of a sewer, and consequently to the validity of assessments for its cost, and that the taxpayer has a right to avail himself of their non-observance as a defence to an assessment which it is sought to collect of him. *Torrey* v. *Millbury*, 21 Pick. 64. *In re Emigrant Industrial Savings Bank*, 75 N. Y. 388. *Poth* v. *New York*, 151 N. Y. 16. *Schumm* v. *Seymour*, 9 C. E. Green, 143. *Harper's appeal*, 109 Penn. St. 9, 14. Dillon, Mun. Corp. (3d ed.) §§ 466 *et seq.*

The effect of this construction is to prohibit the making and letting of contracts except in the manner provided by statute. The approval of the letting by the mayor, if what he did is to be so construed, was ineffectual. The statute contemplates on his part a precedent authority to contract without inviting proposals, not a subsequent ratification or approval of a contract

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which has been made without any advertising for proposals, and which might take place months after the contract had been entered into. Nor does it matter that the cost of the sewer may not have been increased by the method that was pursued. The taxpayer has a right to insist that provisions intended for his security shall be observed, notwithstanding the fact that, in a particular case, he may have suffered no harm by reason of the neglect of the authorities to comply with them. *In re Emigrant Industrial Savings Bank, ubi supra.*

The defendant contends that, under St. 1892, c. 402, he could build the sewer by contract or not, as he saw fit. But there is nothing in that statute which expressly or by implication repeals St. 1890, c. 418, and the matters to which the two acts relate are different, as is shown in part by their titles. The first three sections of St. 1890, c. 418, relate to the tenure of office of the persons therein named. The next three relate to the manner in which contracts by the public departments shall be made. The seventh relates to the manner in which the treasurer shall dispose of city bonds, and the eighth repeals a section of St. 1885, c. 266, which is wholly immaterial so far as the present question is concerned. On the other hand, St. 1892, c. 402, relates principally to the assessment and collection of the expenses incurred in making sewers, omitting any reference to the manner in which contracts are to be made for building them, and leaving that, as it seems to us, to be governed by laws already enacted. Otherwise it would follow that, though the manner in which contracts should be made was carefully guarded in respect to all other departments, in the important matters of sewers the superintendent could do as he saw fit. We see nothing from which it fairly can be inferred that the Legislature intended such a result. A slight argument against it may also be found in the fact that by § 7 two acts are expressly repealed, but no reference is made to St. 1890, c. 418.

We think, therefore, that there was no written authority given by the mayor to the defendant to contract without inviting proposals by advertisement, and that the neglect of the latter to advertise and to take a bond or other security renders the assessments invalid. Whether, if all of the other provisions of the statute had been complied with, the failure to take a bond

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would of itself be sufficient to invalidate the assessments, it is not now necessary to decide.

Other objections to the validity of the assessments have been urged by the petitioners, but we find it unnecessary to consider them. *Petition granted; writ to issue.*

RENA M. JONES, administratrix, *vs.* NEW YORK LIFE INSURANCE COMPANY.

Worcester. September 30, 1896. — May 18, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Life Insurance — Evidence — Delivery of Policy — Application — Waiver — Payment of Premium.

In an action upon a policy of insurance on the life of the plaintiff's husband, the question, put by the defendant's counsel to the plaintiff, whom he had called as a witness, whether she made objection to her husband to his taking the policy, is properly excluded.

If the agent of an insurance company testifies for the defendant, in an action upon a policy issued by the company on the life of A., that the policy was never delivered, the plaintiff may introduce the testimony of witnesses to conversations with the agent in which the latter said that he "had insured" A., that A. "had taken out insurance," and that he "had written a policy" for A.

The production of a policy of life insurance by the administrator of the assured's estate, with testimony that it was found with other papers of the intestate in his desk immediately after his decease, is evidence, in an action upon the policy, that it had been delivered as a valid contract of existing insurance.

A few days after a policy of life insurance, for which an application had been regularly made and signed, was issued, another policy was issued by the same company to the same person, upon which the following words were stamped: "This policy is issued and accepted for two thousand dollars additional insurance, based upon the terms of the application on which" the first policy "was issued, and said application is hereby made a part of this contract." *Held*, in an action on the second policy, that the provision quoted was a part of the contract to be considered with the rest of the policy, and if the defendant delivered the policy in this form as a completed contract, waiving the signing of another application, and received the premium, the contract was binding.

In an action upon a policy of life insurance, the defendant is not entitled to a ruling that "on the evidence the policy in suit would not be a valid policy of existing insurance, unless accepted by the signature of the insured to the application and the forwarding of a check for the premium or the payment of the premium

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otherwise," if there is evidence which will warrant a finding that the defendant's agent waived an immediate payment of the premium in cash and delivered the policy on the promise of the assured to pay in the future.

CONTRACT, upon a policy of insurance for $2,000, issued by the defendant on the life of William A. Jones, the plaintiff's intestate. At the trial in the Superior Court, before *Gaskill*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

The case was argued at the bar in September, 1896, and afterwards was submitted on briefs to all the justices.

W. S. B. Hopkins & T. H. Gage, Jr., for the defendant.

H. Parker, (*C. C. Milton* with him,) for the plaintiff.

KNOWLTON, J. 1. The presiding justice could properly exclude the question put by the defendant's counsel to the plaintiff, whom he had called as a witness, whether, as a matter of fact, she made objection to her husband to his taking the policy declared on. Proof that she objected in a preliminary conversation would have no tendency to prove that he did or did not afterward take the policy. Besides, the question called for a communication made by a wife to her husband, and it was not so framed as to exclude private conversations.

2. The testimony of the witnesses Davis, Curtis, and Dr. Sawyer to conversations with the defendant's witness, Dows, was competent as tending to contradict him.* He had testified in substance that the policy was never delivered, either for cash or on credit.

3. The court properly refused to give the instruction, "There is no evidence in the case competent to prove the delivery of the policy in suit as a valid policy of existing insurance." The production of the policy by the plaintiff, with testimony that it was found with other papers of the intestate in his desk immediately after his decease, was evidence that it had been delivered as a valid contract of existing insurance. *Chandler* v. *Temple*, 4

* Davis testified that Dows, who was the defendant's agent, said that he "had insured" Jones for $3,000; Sawyer testified that Dows said that Jones "had taken out the $2,000 additional insurance"; and Curtis testified that Dows said that he "had written two policies" for Jones. It appeared in evidence that, prior to the issuing of the policy in suit, the defendant had issued a policy for $1,000 to Jones.

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Cush. 285. *Valentine* v. *Wheeler*, 116 Mass. 478. *Perley* v. *Perley*, 144 Mass. 104, 107. Such a document is not ordinarily found in the custody of the assured unless it belongs to him as a contract that may be enforced according to its terms. Possession by the assured is evidence that everything has been done that need be done to give it validity. The effect of the testimony of the witness Dows, in connection with the other circumstances of the case, was for the jury.

4. The only other exception is to the refusal of the court to rule that, "on the evidence the policy in suit would not be a valid policy of existing insurance, unless accepted by the signature of the insured to the application and the forwarding of a check for the premium or the payment of the premium otherwise." The bill of exceptions states that "appropriate instructions, to which no exception was taken, were given to the jury on all issues in the case, the defendant claiming only that the requests should also have been given." The proposition involved in the request is in substance that it would be impossible for the company to deliver its policy in such a way as to give it validity, unless the application was signed by the assured, and payment of the premium was made by check or otherwise. Unless the proposition is correct in both of its branches, the instruction was rightly refused.

The only reference in the policy to the application and to the payment of the premium is in a recital of the consideration for the defendant's undertaking. There is no provision in the policy that the binding force of the defendant's promise shall depend upon the accuracy of the statement of the consideration. If a deed poll is founded on a valuable consideration, it is immaterial whether the consideration is correctly stated in it or not. Signing the application and making payment in cash or by check are not made conditions precedent to the taking effect of the policy. The policy in suit is dated May 19, 1894, and the defendant had just issued to the assured another policy for $1,000, dated May 8, 1894, for which an application had been regularly made and signed. Stamped upon the policy in suit are these words: "This policy is issued and accepted for two thousand dollars additional insurance, based upon the terms of the application on which Policy No. 609,091 was issued, and said appli-

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cation is hereby made a part of this contract." No. 609,091 was that of the policy dated May 8. This provision is a part of the contract to be considered with the rest of the policy, and if the defendant delivered the policy in this form, as a completed contract, waiving the signing of the other application, and received the premium, as the jury might find that it did, the contract is binding. The cases show that the making of an application referred to in a policy may even be waived orally. *Commonwealth* v. *Hide & Leather Ins. Co.* 112 Mass. 136. *Ames* v. *New York Union Ins. Co.* 4 Kernan, 253.

We are of opinion that the other part of the proposition was equally erroneous. We understand that the instruction was intended to call for a payment in cash or its equivalent, as distinguished from a delivery on credit. But it has often been held that a company may waive a provision of this kind, and that, if a note or a promise is accepted in payment, the policy is in force. *Markey* v. *Mutual Benefit Ins. Co.* 103 Mass. 78. *White* v. *Connecticut Ins. Co.* 120 Mass. 330. *Wheeler* v. *Watertown Ins. Co.* 131 Mass. 1, 7. *Miller* v. *Life Ins. Co.* 12 Wall. 285, 302, 303. *Washoe Tool Manuf. Co.* v. *Hibernia Ins. Co.* 7 Hun, 74; *S. C.* 66 N. Y. 613.

The case is not like *Dunham* v. *Morse*, 158 Mass. 132, 134, in which payment in cash was made a condition precedent to the policy's taking effect.

There was evidence from which the jury might have found that the agent, Dows, waived an immediate payment of the premium in cash, and delivered the policy on the promise of the assured to pay in the future. A majority of the court are of opinion that this instruction was rightly refused.

Exceptions overruled.

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CATHERINE A. DEVINE *vs.* CORNELIUS H. MURPHY.

Bristol. October 26, 1896. — May 18, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract — Trial — Statute of Limitations — Consideration — Action.

It is error to direct a verdict for the plaintiff in an action, although his testimony is uncontradicted, and, if believed, entitles him to recover.

If, more than six years after the sum secured by a mortgage given without a note is due and unpaid, the mortgagee discharges the mortgage and acknowledges satisfaction of the debt secured by it, at the mortgagor's request and upon his oral promise to pay to the mortgagee the amount of the debt and interest if he would execute such discharge, the transaction is not a new promise to pay the old debt, within the meaning of the statute of limitations, Pub. Sts. c. 197, § 15, but it is a contract for a valuable consideration outside of the statute upon which an action may be maintained.

CONTRACT, to recover $525, with interest from October 16, 1880, to the date of the writ, August 17, 1894. The answer, among other defences, set up the statute of limitations. Trial in the Superior Court, before *Hopkins*, J., who directed the jury to return a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in October, 1896, and afterwards was submitted on briefs to all the justices.

T. F. Desmond, for the defendant.

L. T. Willcox, for the plaintiff.

KNOWLTON, J. The evidence tends to show that on October 16, 1880, the defendant owed the plaintiff, who is his sister, $525, and gave a mortgage on his real estate to secure payment of it. He gave the plaintiff no note, and no written evidence of debt other than the mortgage, the condition of which was the payment of this sum, with interest semiannually. The plaintiff testified, and her evidence was not contradicted, that on July 26, 1889, he had not paid any part of it, and that he came to her house with his wife one night after she and her husband were in bed, and said that he was in trouble and was likely to be imprisoned if he did not get that mortgage discharged. The

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declaration alleges that he had then sold the real estate and given a warranty deed of it without disclosing the existence of the mortgage. She further testified that he told her that, if she would cancel and discharge the mortgage, he would pay her the $525 and the interest which had accumulated since 1880, and that, relying on this promise, she discharged the mortgage on the next morning, signing a writing which acknowledged the receipt of full satisfaction for the debt secured by it. The action is brought on this contract to pay.

The judge was in error in directing a verdict for the plaintiff, because the jury might have disbelieved her testimony; but he was right in refusing to rule that upon the evidence she could not recover. The defendant contends that he merely made a new promise to take the debt out of the statute of limitations, and that it was invalid because it was not in writing. Pub. Sts. c. 197, § 15. But we are of opinion that the evidence tends to show a transaction entirely outside of the statute of limitations. The plaintiff had a valuable interest in the defendant's real estate. He wanted her to release it, and promised to pay her a sum of money if she would. She executed the release and acknowledged satisfaction of her old debt, relying upon his promise. She is entitled to performance on his part. He has received the full consideration which was contemplated when the promise was made, and it is an ordinary case of a simple contract for a valuable consideration. It was not a new promise, made to take the case out of the operation of the statute of limitations, within the meaning of the statute above cited. That his promise was to pay the amount of the old debt and interest does not make the contract less binding than if he had promised to give the plaintiff any other sum of money or any other kind of property. *Weld* v. *Nichols*, 17 Pick. 538. *Cutter* v. *Cochrane*, 116 Mass. 408.

The contract on which the plaintiff sues is no less enforceable because the defendant owed a duty to pay the same sum if no new contract had been made, nor because this duty might have been made binding in law by a new promise in writing without a new contract for a valuable consideration. In its legal aspect the case is the same as if the mortgage had been made less than six years before the date of the writ. In that case the plaintiff

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would have been entitled to recover, as she is in this, not on the contract made when the mortgage was given, but on the contract for a valuable consideration, made when she gave up her security. In the opinion of a majority of the court, the jury should have been instructed that, if they believed the testimony of the plaintiff, and found that she discharged the mortgage and acknowledged satisfaction of the debt secured by it at the defendant's request, and on his promise to pay her the amount of the old debt and interest if she would execute the discharge, she was entitled to recover. *Exceptions sustained.*

SUSIE B. HIGGINS *vs.* INHABITANTS OF NORTH ANDOVER.

Essex. November 4, 1896. — May 18, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Defect in Highway — Notice — Statute.

In an action against a town for personal injuries occasioned by a defect in a highway, a notice by the husband of the plaintiff to the selectmen of the time, place, and cause of the injury will be regarded as sufficient, if it can be gathered from its terms and from the circumstances of the parties that it was signed and given by the husband in behalf of his wife.

TORT, for personal injuries occasioned to the plaintiff while travelling on a highway in the defendant town. The answer was a general denial, and also alleged that the denial included the allegation of notice. Trial in the Superior Court, before *Sherman*, J., who, being of opinion that the notice was insufficient, and that the evidence offered was not sufficient in law to cover all the defects of the notice and give validity to it, directed a verdict for the defendant, and, at the request of the plaintiff, reported the case for the determination of this court. The facts appear in the opinion.

The case was argued at the bar in November, 1897, and afterwards was submitted on briefs to all the justices.

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H. P. Moulton, for the plaintiff, submitted the case on a brief.

N. P. Frye, for the defendant.

BARKER, J. The accident by which the plaintiff was hurt occurred on December 29, 1894, and the following notice was given and received on January 3, 1895: "To the selectmen of the town of North Andover, for the town of North Andover, I hereby give notice that I hold the town of North Andover responsible for serious injury sustained by my wife, Susie Bell Higgins, Saturday 29, 1894, by being thrown from a sleigh on the South Andover road between North R. and Andover. Accident being due to the unbroken and dangerous said road. And I further give notice that said road remains in a dangerous condition, notwithstanding due notice of the same to the road commissioner. Mr. John F. Higgins, Middleton, Mass." The defendant gave no counter notice, under St. 1894, c. 389. The chairman of the defendant's selectmen, with a physician employed by the town, called at the plaintiff's residence on January 7, 1895, to ascertain the extent of her injuries, and then went with her husband to the place of the accident, where the husband pointed out to the selectman the exact location, and told him the time and place of the occurrence, so that the defendant was seasonably put in possession of all the information contemplated by the statute.

While the specific statute requirements are only that the notice shall be given within a certain time, that it shall state the time, place, and cause of the injury, and that it shall be in writing signed by the person injured or by some one in his behalf, the decisions in which the statutes have been construed hold that the notice must also show that it is the basis of a claim against the defendant, and that it is given in behalf of the person who brings the suit. In *Kenady* v. *Lawrence*, 128 Mass. 318, where the person injured seasonably informed an officer of the defendant city of the time, place, and cause of the injury, the communication was held insufficient as a notice under St. 1877, c. 234, because it did not indicate that the plaintiff understood that he had any claim against the city, did not make it the duty of the official to inform the other city officers, gave no warning that the city was in fault, and did not therefore put it on inquiry, as the statute notice was intended to do. In *Driscoll* v. *Fall River*,

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163 Mass. 105, writings which the plaintiff contended were a sufficient notice under St. 1887, c. 270, § 3, and amendments thereto, were held insufficient because they purported neither "to be given in behalf of the plaintiff, nor to indicate that he had any claim against the city," and it was said, citing also *Kenady* v. *Lawrence*, "The notices required by the statute are not to be construed with technical strictness, but enough should appear in them to show that they are intended as the basis of a claim against the city or town, and are given on behalf of the person who brings the suit." But in *Carberry* v. *Sharon*, 166 Mass. 32, it was held to be not necessary that the notice should say in express terms that it is signed in behalf of the plaintiff, if that can be gathered from its terms. The notice held good in that case showed that the signer was the husband of the plaintiff, and that she had received an injury "for which," it stated, "we will be obliged to make a claim on your town for damages."

We have no disposition to question the construction given by these decisions to the statutes requiring notice, and the question is whether it can be gathered, from the terms of the notice in the present case, that it was signed and given by the plaintiff's husband in her behalf.

It is true that, by the language used over his own signature, the plaintiff's husband states, "I hereby give notice that I hold the town of North Andover responsible for serious injury sustained by my wife, Susie Bell Higgins." But it is not the necessary meaning of these words that he holds the town responsible to himself. The situation of the parties may be taken into account in determining the meaning of the terms of such a notice, as well as those of a deed or other written instrument. It is both proper and usual for a husband to act as the protector of the rights of his wife, and he is very commonly her agent. The responsibility of the town which he was asserting was a responsibility to his wife, and not to himself. In such a case the husband has no right of action. *Harwood* v. *Lowell*, 4 Cush. 310. Not only is it to be presumed that he knew that he had no right to hold the town responsible to himself, while it was responsible to his wife, but that he understood that the town officers also knew the law and would apply that knowledge in construing the notice. Besides this, the plaintiff and her husband lived in a small town

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away from the village, and five or six miles from any person skilled in drawing such notices, and the plaintiff was severely injured, confined to her bed and helpless, and requiring the constant attendance of her husband, who did not leave the premises except to point out the place of the accident to the town official who visited his residence after the receipt of the notice. In view of the circumstances existing when the notice was given, we are of opinion that it can be fairly gathered from its terms that the husband was acting for his wife and gave the notice as her agent. If so, it could not be held insufficient as not showing that it was given on behalf of the plaintiff. So far as its other defects are concerned, upon the facts offered in proof it might have been found that the town was not misled, and that there was no intention to mislead. See St. 1882, c. 36; St. 1888, c. 114. Or the plaintiff might avail herself of the failure to demand a further notice under St. 1894, c. 389.

In accordance with the terms of the report, the verdict for the defendant is to be set aside and a new trial ordered.

So ordered.

PATRICK COLEMAN *vs.* MECHANICS' IRON FOUNDRY COMPANY.

Suffolk. January 12, 1897. — May 18, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Defective Implement — Evidence.

If an implement, the breaking of which is attended with danger, breaks in the proper use of it for the purpose for which it was designed, this is some evidence, in an action for personal injuries occasioned to an employee by the breaking, that the implement was defective in the sense that at the time it was not safe or suitable for the use to which it was put.

If, in an action for personal injuries occasioned to the plaintiff by the spilling upon him of molten iron from a ladle in consequence of the breaking of a shank in which the ladle was placed, the plaintiff testifies that at the time of the accident he and a fellow servant who was assisting him in carrying the implement were walking along at a pretty rapid rate, and another witness says that they were

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going between a quick walk and a dog trot, and there is evidence tending to show that running with a ladle upon the shank had been forbidden on account of the strain it put upon the shank, evidence that the plaintiff and his fellow servant were running with the ladle on the two trips immediately before the accident is admissible on the question whether the shank had been put to any improper strain by the plaintiff and his companion.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

T. W. Proctor, for the defendant.

D. B. Ruggles, for the plaintiff.

KNOWLTON, J. The plaintiff and one Keegan, in the foundry of the defendant, were carrying an iron ladle thirteen inches deep and holding one hundred and sixty pounds of melted iron, by means of a shank which consisted of a wrought iron hoop large enough to receive and hold the ladle, to which hoop, on two opposite sides, was attached a wrought iron bar two and a half feet long, with handles, making the whole thing about five feet long. The ladle had a rim at the top which rested on the hoop, and in carrying it one of the men walked in front and the other behind, both facing in the same direction. They had carried two ladlefuls from the furnace and poured them into the moulds when, as they were carrying the third, the shank broke at a point about two or three inches from the hoop on the side nearest to the plaintiff, and the molten iron was spilled and he was burned. The shank was an inch and a half thick at the place of fracture. There were fifteen shanks similar to this for use in carrying ladles, and several of the plaintiff's witnesses testified that this was the one which was generally preferred. The evidence tended to show that these shanks were inspected regularly every day to see that they were in good condition. Some of the plaintiff's witnesses testified that after the accident the iron at the point of fracture showed that there was an old crack extending through the greater part of the diameter. Several witnesses for the defendant testified that they examined it and found that there was a new fresh fracture all the way through the iron, and that there were no signs of a previous crack.

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The instruction of the court as applied to the evidence was correct. If an implement like this, the breaking of which is attended with danger, breaks in the proper use of it for the purpose for which it was designed, it is some evidence that it is defective in the sense that at the time it is not safe or suitable for the use to which it is put. *White* v. *Boston & Albany Railroad*, 144 Mass. 404. *Moynihan* v. *Hills Co.* 146 Mass. 586. Its use in its unsafe condition may or may not be due to the negligence of its owner.

The plaintiff testified that at the time of the accident he and Keegan were walking along at a pretty rapid rate, and another witness said they were going between a quick walk and a dog trot. There was evidence tending to show that running with a ladle upon the shank had been forbidden on account of the strain it put upon the shank, because at each step the weight of the ladle would come down like a blow.

Proper instructions were given upon the question whether the plaintiff was in the exercise of due care.

The defendant offered to show that the plaintiff and Keegan were running with the ladle on the two trips immediately before the accident, and to the exclusion of testimony to this effect an exception was taken. It is true that the evidence was not competent as tending to show that they were running at the time of the accident, but for another purpose we are of opinion that it should have been received. In view of the testimony of many witnesses that the iron showed a clean fresh break through the whole diameter of the shank, and of the inspector's statement that the shank was in perfect condition on the morning of that day, it was important for the jury to ascertain, if they could, whether the shank had been put to any improper strain by the plaintiff and his companion immediately before the accident. The three trips together occupied only a very short time. The judge permitted the jury to hear and consider the account of the use that was being made of the implement when it broke; but if they had heard the excluded testimony they well might have believed that it got a severe strain on one of the two trips immediately before the accident, which greatly weakened it, although it did not then give way, and that by reason of a defect so caused it broke a few minutes afterwards.

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For such a condition, caused by the plaintiff's disobedience of orders, the defendant would not be liable. It was not obliged to provide an implement for an improper or unreasonable use, and it could not be expected to have the shank inspected after every trip that was made with it. We are of opinion that this evidence should have been received. *Exceptions sustained.*

LORENZO H. BROCKWAY *vs.* AMERICAN EXPRESS COMPANY.

Suffolk. January 15, 1897. — May 18, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Carrier — Contract for Transportation of Animals — Limitation of Liability for Negligence — Lex Loci Contractus — Principal and Agent — Gross Negligence — Action.

A contract of carriage made in another State, to be performed in part there and in part in other States, and providing that the carrier is not to be liable for any injury or damage to the property, even if caused "from any fault, negligence, or carelessness, gross or otherwise," of itself or its servants or agents, is governed by the law of the State where made, and, if such provision is invalid there, it cannot be availed of in defence to an action on the contract here for injury caused by gross negligence on the part of the carrier or its servants or agents.

If horses, which an express company contracts with the owner to transport upon railroads from one State to another, are kept in the car without food, drink, and rest for forty-nine hours, in violation of U. S. Rev. Sts. §§ 4386–4390, the railroad corporation and the company's agent, who knows that the car is being delayed for several hours at an intermediate point, and is requested by the custodian of the horses to unload them for feed and water, are guilty of gross negligence, for the consequences of which the express company is liable in an action by the owner.

CONTRACT, with a count in tort, for damage caused by the defendant's negligence in the transportation of the plaintiff's horses from Chicago to Boston. Trial in the Superior Court, before *Sheldon*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

A. N. Williams, for the plaintiff.

W. C. Loring, for the defendant.

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KNOWLTON, J. The defendant entered into a contract with the plaintiff to transport twenty-eight horses from Chicago to Boston. The plaintiff contends that the defendant was guilty of gross negligence in keeping the horses confined for a long time without food or drink, whereby they suffered greatly and were seriously injured. The defendant's first contention is, that by the terms of the contract of carriage it was not to be liable for any injury or damage to the property, even if caused "from any fault, negligence, or carelessness, gross or otherwise," of itself or its servants or agents.

The first question is whether this provision of the contract is valid. The contract was made in Illinois, to be performed in part in that State and in part in other States. The rights of the parties to such a contract are to be determined by the *lex loci contractus*. *Fonseca* v. *Cunard Steamship Co.* 153 Mass. 553. *Fairchild* v. *Philadelphia, Wilmington, & Baltimore Railroad*, 148 Penn. St. 527. *Hazel* v. *Chicago, Milwaukee, & St. Paul Railway*, 82 Iowa, 477. The law of the State of Illinois was put in evidence, by which it appeared that in that State a common carrier cannot contract against liability arising from the gross or wilful misconduct of himself, his agents or employees. *Chicago & Northwestern Railway* v. *Chapman*, 183 Ill. 96. The same doctrine is generally, although not universally, held in other jurisdictions. *Doyle* v. *Fitchburg Railroad*, 166 Mass. 492, 496, and cases cited. The defendant is a common carrier. *Buckland* v. *Adams Express Co.* 97 Mass. 124. *Bank of Kentucky* v. *Adams Express Co.* 93 U. S. 174. It follows that this defence cannot prevail if there was gross negligence on the part of the defendant or its servants or agents.

The plaintiff relies in part upon U. S. Rev. Sts. §§ 4386 to 4390 inclusive, which punish by severe penalties the keeping of cattle, sheep, swine, or other animals for more than twenty-eight hours continuously in cars, boats, or vessels used in carrying or transporting them from one State to another, without unloading them for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so unloading them by storm or other accidental causes, or unless the cars, boats, or vessels are so constructed and arranged that the animals can have proper feed, water, space, and opportunity to

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rest without being unloaded. The contract between the plaintiff and the defendant contemplated the carrying of the horses from one State to another by railroad companies, which were to be the defendant's agents, to which the provisions of the statute above referred to expressly apply. The horses were kept in the car without food or drink and without rest except what they could get standing for about forty-nine hours. The statute does not in terms apply to express companies hiring their accommodations from railroad companies; but there is no doubt that it applies to the railroad companies themselves which the defendant employed in the present case. The statute is intended to prevent cruelty in interstate commerce, as well as danger to the public health, from inducing diseases in animals which are to be used for food. The existence of this statute, even though it does not subject the defendant itself to a penalty, is strong evidence of the defendant's duty to give a reasonable opportunity to the plaintiff's custodian, who accompanied the horses on the train, to provide them with food and drink on their journey. Indeed, if there were no such statute, a contract to convey horses to be accompanied by a custodian would impliedly include an undertaking to allow the custodian to stop at reasonably convenient times and places to give them such food and drink as they needed to keep them in good health. Not to permit the giving of such food and drink would be gross negligence. So it has been held under the statute above cited, as well as at common law. *Chesapeake & Ohio Railway* v. *American Exchange Bank*, 92 Va. 495. *Nashville, Chattanooga, & St. Louis Railway* v. *Heggie*, 86 Ga. 210. *Smith* v. *Michigan Central Railroad*, 100 Mich. 148. *Illinois Central Railroad* v. *Adams*, 42 Ill. 474. *Toledo, Wabash, & Western Railway* v. *Hamilton*, 76 Ill. 393. *Dunn* v. *Hannibal & St. Joseph Railroad*, 68 Mo. 268. *Lowenstein* v. *Wabash Railroad*, 63 Mo. App. 68.

It is contended by the defendant, that the plaintiff, by his previous course of dealing with it, and by his knowledge of the custom of the company to bring horses from Chicago to Boston without stopping to feed them, impliedly agreed that these horses might be so brought. But if we give to the evidence the full effect that can reasonably be claimed for it, it falls short of showing that the horses were to be kept on the car

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without feeding if the express company failed to bring the car through on close connections by the usual trains. The evidence shows that the car was delayed in Buffalo by the refusal of a railroad company to take it on the train by which it was expected to go, and that, on this account, it lost its connections, and the horses were kept confined about eight hours longer than the usual time for the trip. It certainly could not have been expected that the horses were to be left to starve if the car was delayed by a failure to make connections, or by a refusal of a railroad company to take it at the usual time.

There was evidence that the plaintiff had made arrangements to have horses watered and fed from time to time at the stock yards at East Buffalo and at Rotterdam Junction. There was also testimony that the custodian of the horses asked the agent of the defendant at Buffalo to have the horses watered and fed. It does not appear that he went much into particulars as to how or where the watering and feeding should be done. But the agent knew that the car was being delayed, and he may be presumed to have known that the horses had been on the car nearly a day before arriving at Buffalo, and that it would take another day for them to reach their destination. They could not be taken from the car without moving it, and it was the agent's duty, on receiving the request, to have the car taken to a place where they could be unloaded. Under the statute above referred to, it was the duty of the railroad company to unload, and feed, and water them without a request from their custodian if he failed to do it. Apart from the statute, it was the agent's duty, on a slight suggestion from the custodian, to put the car in a proper place for unloading, where the horses could be fed. We think there was evidence from which the jury might have found that the railroad company and the defendant's agent were guilty of gross negligence in this respect, for the consequences of which the defendant is liable.

Exceptions sustained.

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GUSTAF OLSEN *vs.* DAVID H. ANDREWS.

Suffolk. January 20, 21, 1897. — May 18, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Personal Injuries — Master and Servant — Due Care — Negligence — Assumption of Risk — Fellow Servant — Evidence of Competency.

A., who was employed in repairing a high bridge crossing a river and having railroad tracks laid upon it, was obliged, while going back and forth between his work and his boarding place, to walk upon one of the tracks, which was given up by the railroad corporation to his employer for his use in repairing the bridge, the other track being used for trains. A. entered upon the bridge, in returning from his dinner to his work, and, as a freight train was passing by his side on the other track, a derrick car in use about the work came up behind him, moving at the rate of twelve miles an hour, and he started to run as fast as he could toward the end of the bridge, where his work was, and nearly reached it when the car overtook him and injured him. The only other thing that he could have done was to get down between the ties and climb upon the timbers composing the frame of the bridge and hold on there while the car passed him. *Held*, in an action by him against his employer for his injury, that there was evidence that he was in the exercise of due care.

It is not evidence of negligence on the part of an employer, engaged in repairing a bridge over a river, in failing to provide for his employee some mode of going back and forth between his work and his boarding house other than by walking on the railroad track laid upon the bridge, nor in failing to furnish a different kind of derrick car from that in use about the work when the latter entered the service, and which injures him, if, so far as appears, the car is suitable for the use for which it is intended; but the use of the car and the necessity of passing over the bridge create obvious risks connected with the business in which he is engaged.

A servant, who, in going back and forth between his work and his boarding house, is obliged to walk on a railroad track laid upon a bridge over a river which he is employed in repairing, and is injured while returning to his work at noon by being struck by a derrick car in use about the work, is in his master's service, and a fellow servant with the engineer of the car at the time of the accident.

In an action for personal injuries occasioned to the plaintiff while employed by the defendant, — who was engaged in repairing a bridge crossing a river and having railroad tracks laid upon it, — by being run over by a derrick car in use about the work, the foreman testified that when the men were being selected by A., who was the defendant's agent, to work upon this bridge, the witness objected to the engineer, and said that he did not like the way in which he handled the derrick car; that upon several previous occasions, when they were working in another place, the witness told A. that he did not like the way the engineer was working the derrick car, that he was handling it nervously, and that the witness was afraid of it, that "he was nervous and foolish, and might run over somebody," that "he was liable to run over some man if he did not take him away," and described in his testimony what nervousness he observed

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on the part of the engineer when running the car; and that A. replied, "It don't take much of a man to run a derrick car; anybody can run it." *Held*, that there was evidence of negligence on the part of the defendant in retaining in his service an incompetent servant.

Although specific acts of negligence are not admissible to show the incompetency of a servant, when the conduct of a fellow servant of the plaintiff tending to show his qualifications or his mental or physical fitness or unfitness for his work is properly before the jury upon one of the issues of the case, they may consider it on the question of his competency.

TORT, for personal injuries occasioned to the plaintiff, while employed by the defendant in repairing a bridge, by being run over by a derrick car. Trial in the Superior Court, before *Blodgett*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

P. M. Keating, for the plaintiff.

A. Hemenway, (*G. C. Dickson* with him,) for the defendant.

KNOWLTON, J. At the close of the testimony the presiding justice ruled that there was no evidence to warrant a verdict for the plaintiff, and directed a verdict for the defendant.

There was evidence that the plaintiff was in the exercise of due care. According to the testimony all the men employed by the defendant boarded on the west side of the Hudson River, while their work was upon a bridge crossing the river, and a part of it at the east end of the bridge. The only way from the plaintiff's work to his boarding place was over the bridge on the northerly or west bound track, which was given up by the railroad company to the defendant for his use while repairing the bridge. It was against the rule to ride on the derrick car, and he was obliged to walk. He had been to his dinner on the west side of the river, and was returning over the bridge when the derrick car came up behind him and ran over him. The engineer who was running the derrick car had been working with his car on or about the bridge at least five days, and may be presumed to have known that the men were accustomed to walk back and forth across the bridge at the dinner hour. The bridge was sixty or seventy feet above the water. The southerly or east bound track was used at the time by the railroad company for its trains going in both directions. When the plaintiff entered upon the bridge at the west end there were four men crossing over before

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him. A freight train came behind him on the southerly track and was passing by his side when the derrick car came up, so that it was impossible to step across to that track. When he saw the derrick car coming it was moving at the rate of about twelve miles an hour, and he started to run as fast as he could toward the end of the bridge, and got nearly to the end of it when the car overtook him. The only other thing that he could have done was to get down between the ties and climb upon the timbers which constituted the frame of the bridge, and hold on there while the car passed above him. To do this quickly would have been difficult and not free from danger. He well might suppose that the engineer running the car would check its speed until he could reach the end of the bridge, instead of running over him. He had every reason to believe that the engineer, before entering upon the bridge, had looked ahead to see whether pedestrians were upon the track. If the engineer had looked seasonably he could not have failed to see the plaintiff. It was not to be expected that he would deliberately run over a fellow workman, or that he would even expect one to get down under the track and cling to the timbers to save one or two minutes for those who were using the car. If the plaintiff thought himself in great danger, and acted under excitement, he may well be excused if he failed to adopt the best course.

We are of opinion that there was no evidence of negligence on the part of the defendant in failing to provide for the plaintiff some other mode of getting back and forth between his work and his boarding house, nor in failing to furnish a different kind of derrick car. The defendant owned and was using the car when the plaintiff entered his service. So far as appears, it was suitable for the use for which it was intended. The use of it and the necessity of passing over the bridge created obvious risks connected with the business in which the plaintiff was engaged.

The plaintiff contends that he was not in the defendant's service, and that he was not a fellow servant with the engineer at the time when the accident happened. He was upon the bridge which his employer was repairing and on which he was engaged to work. Although he was not working, but only

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returning to his work at the end of the bridge, we think that his use of the bridge was so far incidental to his service that in reference to risks growing out of the use of it by others engaged in the master's service he should be deemed to be a servant. We are of opinion that this contention cannot be maintained.

The plaintiff contends that, if they were fellow servants, there was evidence that the defendant was negligent in hiring the engineer, or in retaining him in his service. The evidence principally relied on to prove this came from one Sanderson, the foreman. It appears that one Nash represented the defendant in hiring and discharging the men, and, if he was guilty of negligence in this department of the business, his negligence is to be imputed to the defendant. *Gilman* v. *Eastern Railroad*, 13 Allen, 433. Sanderson testified that, when the men were being selected by Nash to work upon this bridge, he objected to the engineer, and said that he did not like the way in which he handled the derrick car. He also testified that upon several previous occasions, when they were working in Providence, he told Nash he did not like the way he was working the derrick car, that he was handling it nervously and that the witness was afraid of it, that "he was nervous, and foolish, and might run over somebody," and that "he was liable to run over some man if he did not take him away." In answer to the question what nervousness he observed on the part of the engineer when running the car, he replied that "he would shut right up and snap his eyes when any responsibility was required, and go ahead. Open his throttle and let her go quick, full speed." He testified that, among other things, Nash said in reply, "It don't take much of a man to run a derrick car; anybody can run it." This testimony, if believed, would well warrant the jury in finding that Nash had his attention directed to the question whether the engineer was a suitable man for his place, and that he did not think his qualifications of a high order. If there was evidence to warrant a finding that he was in fact incompetent, this part of the plaintiff's case would entitle him to go to the jury. Sanderson's testimony of what he observed, although it is indefinite and not very satisfactory, has some tendency to show that the engineer in his general conduct was not a man of cool

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head and sound judgment, well qualified to meet an emergency in the management of a locomotive engine. Nash's answer, quoted above, made within the scope of his agency, might be considered for what it was worth.

We are of opinion that upon this question the conduct of the engineer just before the accident might be considered by the jury. It has been held by this court that specific acts of negligence cannot be introduced to show the incompetency of a servant. *Hatt* v. *Nay*, 144 Mass. 186. *Kennedy* v. *Spring*, 160 Mass. 203, 205. *Connors* v. *Morton*, 160 Mass. 333. *Driscoll* v. *Fall River*, 163 Mass. 105. The reason of this rule is that such evidence might present a multiplicity of issues that could not properly be tried together. In other jurisdictions the authorities on this question are conflicting. See *Baulec* v. *New York & Harlem Railroad*, 59 N. Y. 356; *Pittsburgh, Fort Wayne, & Chicago Railway* v. *Ruby*, 38 Ind. 294; *Frazier* v. *Pennsylvania Railroad*, 38 Penn. St. 104. But it has never been held in this Commonwealth, when conduct of a fellow servant tending to show his qualifications, or his mental or physical fitness or unfitness for his work, is properly before a jury upon one of the issues of the case, that they are forbidden to consider it on the question of his competency. In *Peaslee* v. *Fitchburg Railroad*, 152 Mass. 155, it seems to have been assumed that such evidence is competent upon this issue. Of course it is not competent on the question whether his employer was negligent in hiring him or retaining him in his service without independent proof that the employer ought to have discovered his incompetency. *Keith* v. *New Haven & Northampton Co.* 140 Mass. 175. While the evidence relied on to show negligence in retaining the servant seems to us slight and of little significance, we are of opinion that it presented a question for the jury. The evidence offered by the plaintiff to show how the engineer ran the car while on this work, before the accident, was rightly excluded. It referred to special acts of alleged negligence, and so far as appears the defendant had no knowledge of them.

Exceptions sustained.

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MARY L. ANDREWS *vs.* FREDERICK H. JACKSON.

Middlesex. January 21, 1897. — May 18, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Deceit — False Representations — Evidence — Action — Rescission or Affirmation of Contract — Tender — Instructions.

In an action for deceit for false representations as to the value of certain notes, it appeared that they were turned over to the plaintiff, who was a woman, in part payment of the agreed price for land sold to the defendant; that he professed to know, and probably did know, all about the financial standing of the maker of them, who lived in Boston, while the plaintiff lived in a suburban town and knew nothing of the maker; that she was obliged to take the defendant's representations or to decline to deal with him until she could go to Boston and make an investigation for herself; that he represented the notes to her to be as good as gold, and told her that he had lent money to the maker, saying, "Do you suppose I would lend my money to any one that was not good?" *Held*, that the evidence was sufficient to warrant a finding that the false representations were actionable.

If an action does not rest upon a rescission of a contract, but upon an affirmation of it, and upon a claim for damages for false representations in regard to certain notes delivered to the plaintiff under it, a request to rule "that the tender of the notes at the time of the trial was made too late to effect a rescission of the contract, or that part of it relating to the notes," is rightly refused.

TORT, for deceit. The declaration alleged that the plaintiff sold and conveyed to the defendant certain real estate situate in Medford "for the sum of nineteen hundred dollars, and received in payment thereof fourteen hundred dollars in cash and four certain promissory notes all signed by one H. Joseph, amounting together to the sum of six hundred and fourteen hundredths dollars; that the defendant, to induce the plaintiff to convey said real estate to him, falsely represented to the plaintiff that the maker of said notes was a man of property, and that said notes were as 'good as gold'; that your plaintiff, believing said representations to be true, was thereby induced to convey said real estate to the defendant; that said representations were false and were known to the defendant to be false, and by reason thereof the plaintiff suffered great damage."

Trial in the Superior Court, without a jury, before *Hammond*,

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J., who found for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

The case was submitted on briefs to all the justices.

H. R. Bailey & J. H. Appleton, for the defendant.

W. P. Martin, for the plaintiff.

KNOWLTON, J. The principal question in this case is whether there was any evidence to warrant a finding that the false representations made by the defendant in regard to the notes were actionable. This finding is in these words: "I find that the defendant represented these notes to be as good as gold, and that that representation was intended by him and understood by the plaintiff, not to be an expression of opinion, but a statement of a fact of his own knowledge. I find that the notes were worthless." It is contended by the defendant that such a representation is necessarily, and as matter of law, a mere expression of opinion, for which, however wilfully false, and however damaging in the reliance placed upon it, no action can be maintained.

It is true that such a representation may be, and often is, a mere expression of opinion. But we think that it may be made under such circumstances and in such a way as properly to be understood as a statement of fact upon which one may well rely.

In *Stubbs* v. *Johnson*, 127 Mass. 219, one of the representations in regard to a note was that it was "as good as gold," and the jury were instructed that, if this was intended as a representation of the financial ability of the maker of the note, it was a statement of a material fact, for which the defendant was liable. This instruction was held erroneous "because a representation as to a man's financial ability to pay a debt may be made either as a matter of opinion, or as a matter of fact; the subject of the statement does not necessarily determine which it is. . . . It is often impossible," says Mr. Justice Colt further in the opinion, "to determine, as matter of law, whether a statement is a representation of a fact, which the defendant intended should be understood as true of his own knowledge, or an expression of opinion. That will depend upon the nature of the representation, the meaning of the language used, as applied to the subject matter, and as interpreted by the surrounding circumstances, in

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each case. The question is generally to be submitted to the jury." The opinion plainly implies that, if the jury had been left to determine whether there was a representation of the maker's financial ability to pay made as matter of fact and not as mere matter of opinion, they might have found against the defendant on his false representation that the note was "as good as gold." In *Belcher* v. *Costello*, 122 Mass. 189, there is also a strong intimation that the rule is as above stated. In *Safford* v. *Grout*, 120 Mass. 20, the representation set out in the declaration was that the maker of the note "was a person of ample means and ability to pay said note, and that the note was good." The plaintiff was allowed to recover. The court says of the representations, "We must presume that they were legally sufficient to support the action; that is to say, that they were statements of facts susceptible of knowledge, as distinguished from matters of mere opinion or belief." See also *Morse* v. *Shaw*, 124 Mass. 59; *Teague* v. *Irwin*, 127 Mass. 217.

In two recent cases, *Way* v. *Ryther*, 165 Mass. 226, and *Kilgore* v. *Bruce*, 166 Mass. 136, 138, this court has expressed a disinclination to extend the rule which permits dealers to indulge with impunity in false representations of opinion.

In the case now before us the notes were turned over to the plaintiff in part payment of the agreed price for land sold to the defendant. He professed to know, and probably did know, all about the financial standing of the maker of them, who lived in Boston. The plaintiff lived in a suburban town and knew nothing of the maker. She was obliged to take the defendant's representations or to decline to deal with him until she could go to Boston and make an investigation for herself. He told her that he had lent money to the maker, and said, "Do you suppose I would lend my money to any one that was not good?"

A representation that a note is as good as gold may be founded on absolute personal knowledge of the validity of the note, and upon an equally certain knowledge of the maker's financial ability. The known facts upon which financial ability depends may be so clear and cogent as to make the consequent conclusion, which ordinarily would be a mere matter of opinion, a matter of moral certainty which can properly be called knowledge. We cannot say, as matter of law, that this representation was not

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intended to be, and properly understood to be, a representation of facts within the defendant's knowledge.

The case of *Deming* v. *Darling*, 148 Mass. 504, differs materially from this at bar. The property to which the representation related was one of many mortgage bonds issued by a railroad company, of which, in the language of the opinion, the "market prices at least were easily accessible to the plaintiff." The representations which were held to be insufficient on which to found an action were "in relation to the value of the bond in question, or of the railroad, its terminals, and other property which were mortgaged to secure it." The value of articles sold in market, and especially of railroad property and of railroad bonds payable in the distant future, is ordinarily only a matter of opinion. A statement of the value of such property is very different from a statement that a promissory note which is almost due is known to be valid, and that the maker of it is a person of such known integrity and financial ability that his promise to pay is as good as that of the State or nation. A statement that a note is as good as gold may be intended to represent facts of this kind.

The request to rule "that the tender of the four notes at the time of the trial was made too late to effect a rescission of the contract, or that part of it relating to the notes," was rightly refused. The action does not rest upon a rescission of the contract, but upon an affirmation of it, and upon a claim for damages for false representations in regard to the property delivered to the plaintiff under it.

Exceptions overruled.

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JOHN H. McKAY *vs.* JAMES B. HAND.

Norfolk. November 13, 1896. — May 19, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Employers' Liability Act — Works, Ways, or Machinery — Ladder.

At the trial of an action for personal injuries received by the plaintiff in consequence of the breaking of a ladder on which he was standing while painting the outside of a house, there was evidence that the plaintiff and two fellow workmen selected from a lot of ladders furnished by their employer for the job two ladders about twenty-two feet and twelve feet long respectively, and, splicing them together, placed them against the side of the house so that while the foot of the ladders stood about twelve feet from the house the upper end rested against it just beneath the coving; that the ladder which broke was painted, and contained no apparent defects; and that the plaintiff, though expressing doubts as to the strength of the ladders, was assured of their strength by one of his fellow workmen. It did not appear that the defendant was present when the men were at work, and there was no evidence of a defect in the ladder except the fact that it broke, and the testimony of witnesses that a sound ladder would not have broken under those conditions, nor did it appear that the ladder was too small, or that it was made of unsuitable materials, or that the side pieces were rotten or otherwise defective. *Held*, that an action could not be maintained either at common law or under the employers' liability act, St. 1887, c. 270.

Two ladders spliced together by employees, and placed against the side of a house for the purpose of painting it, do not necessarily constitute a part of the ways, works, or machinery of an employer under the employers' liability act, St. 1887, c. 270.

TORT, for personal injuries received in consequence of the breaking of a ladder on which the plaintiff was standing while engaged in the defendant's employ in painting the outside of a house. Trial in the Superior Court, before *Sheldon*, J., who ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

A. H. Russell, for the plaintiff.

S. H. Tyng, for the defendant.

FIELD, C. J. This is an action for personal injuries received in consequence of the breaking of a ladder on which the plaintiff was standing while engaged in the work of painting the outside of a house.

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The declaration as amended contains four counts, the first three under the employer's liability act, St. 1887, c. 270, and the fourth at common law. The presiding justice directed a verdict for the defendant, and to this the plaintiff excepted.

Three men, including the plaintiff, were employed by the defendant, who furnished a load of ladders for the job, and one of the men selected two ladders, and the three spliced the ladders together and then raised them against the house. The ladder known as the butt was about twenty-two feet long, and the other, known as the tip, was about twelve feet long. The two ladders when fastened together as they were first raised against the house, extended above the eaves of the roof, whereupon the foot of the ladders was pulled out about twelve feet from the house, so that the upper end of the ladders reached just beneath the coving of the roof. The plaintiff went up the ladders with a pot of paint in one hand and a paint brush in the other, when one of the ladders broke and he fell to the ground and was injured. The evidence does not distinctly disclose which ladder broke, or how far up on the ladders the plaintiff was when the ladder broke; but we infer that he was near the top of the ladders, that the ladder which broke was the one called the butt, and that it broke on both sides near the upper end. There was no contention that the ladders were not properly fastened together, although they might have been so fastened as to make the whole length shorter, and this would have rendered it unnecessary to place the foot of the ladders so far from the house.

There was evidence that the ladders as they were placed were not in a proper position for work. Precisely what the danger was from the position of the ladders does not expressly appear. The plaintiff testified that it was not a proper way to place the ladders, but that if the ladder had been sound it would not have broken in the position it stood. It is obvious that ladders placed at the incline these were would slip more easily on the ground than if they had been placed nearly perpendicular to it, and that the ladders placed as they were would break more easily under the weight of a man than if they had been placed more nearly upright. It is equally obvious that the more the ladders were extended by splicing, the greater became the danger of

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breaking under any given weight, if the ladders were supported only by the ends.

The plaintiff had, and expressed, doubts of the strength of the ladders as they were placed, but being assured by one of the other men that they were safe, he mounted the ladders. It does not appear that the defendant was present while the men were at work. The plaintiff testified that the ladder which broke was painted, and to all outward appearance was a good ladder, and that if he had known that the ladder was defective he would have taken another ladder.

The accident happened on May 10, 1894, and the only evidence of notice of the time, place, and cause of the accident was an attorney's letter sent to the defendant. We find it however unnecessary to determine whether, on the evidence,* the jury properly could have found that the notice was seasonably received by the defendant, or that its contents were such as to make it a good notice.

There is no evidence of the negligence of any person in the service of the defendant intrusted with and exercising superintendence, and the plaintiff relies in argument solely upon the count charging a defect in the condition of the ways, works, or machinery of the defendant, which arose from or had not been

* On this point one Sullivan testified that he was a clerk in Mr. Richard Sullivan's office; that in 1894 he had something to do with serving a notice upon the defendant; that toward the latter part of the month Mr. Sullivan told him that McKay had been in; and that Mr. Sullivan gave him a note, the contents of which, as nearly as he could recollect, were as follows: "Mr. James B. Hand, Brookline, Mass. A claim has been placed in my hands against you for damages for an accident that occurred at Mr. Cutler's premises, on some street in Brookline in ——, on which your machinery was defective," or some such words, and stating that Mr. Sullivan would like to see him. The witness further testified that he thought the note contained the date May 9; that he saw the note; that he took it to Hand's place of business in Brookline, and, not finding him in, the witness inquired his address at the post office, and learning that his letters came there addressed to Mr. James B. Hand, Brookline, Mass., and that he either had a box, or had some one call each morning, the witness deposited the letter, postage prepaid, in the post office; that on the following morning the defendant called at Mr. Sullivan's office, carrying an envelope having Mr. Sullivan's address in the corner, and stated that it was a note he had received from Mr. Sullivan that morning, but that he could not tell on what day he delivered the note.

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discovered or remedied owing to the negligence of the defendant, and upon the common law count charging the defendant with neglect to furnish safe and proper appliances. If we assume that the jury properly could have found that the notice was duly received and was sufficient, the fundamental contention under both these counts is that the ladder was unsound and unsafe, and that this defect in the ladder ought to have been discovered by the defendant and remedied, or the ladder withdrawn from use. The only evidence of a defect in the ladder is the fact that it broke, and the testimony of witnesses that a sound ladder would not have broken under the circumstances. There does not appear to have been any examination of the ladder after it broke, and there is no evidence whether it was made of suitable materials, or was sufficient in size, or whether the side pieces where it broke were rotten or cross-grained, or had knots in them, or what specifically the defect was.

On the whole case it seems to us that there was not sufficient evidence of negligence on the part of the defendant to be submitted to the jury under either count. The defendant furnished a supply of ladders; there is no evidence that any was unsuitable, unless we except the one that broke; the plaintiff and his fellow workmen selected, spliced, and placed the ladders according to their own judgment, and there was no apparent defect in the ladder that broke. It is unnecessary to determine whether a ladder sometimes may not be a part of the ways, works, or machinery, within the meaning of St. 1887, c. 270, and its amendments. The splicing of the ladders and the placing of them in position were done by the plaintiff and his fellow workmen, and the connection was a temporary appliance, put together by the workmen out of materials selected by them from the ladders furnished by the defendant. We think that the ladders so fastened together did not constitute a part of the ways, works, or machinery of the defendant, within the meaning of the statute. As the selection of the particular ladders, the method of fastening them together and of placing them against the house, was the work of the plaintiff and his fellow workmen, if they or any of them were negligent in any of these things the defendant is not liable for that at common law. The case resembles the common one, where, so far as appears, the defendant furnished a

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supply of suitable materials, and the workmen put them together and used them, and one of the parts broke. See *Burns* v. *Washburn*, 160 Mass. 457; *Adasken* v. *Gilbert*, 165 Mass. 443; *Reynolds* v. *Barnard*, *ante*, 226.

From the description of the ladder which broke it is difficult to see from the evidence that the defendant was negligent in keeping it among his lot of ladders and in permitting it to be used, and if the sole negligence was that the ladders were fastened together and improperly placed against the house, that was the fault of the plaintiff and his fellow workman, and it was known to and appreciated by the plaintiff at the time. A ladder may be a sound light ladder of sufficient strength to be used by itself, but not suitable to be made the butt of two ladders fastened together. *Exceptions overruled.*

CHARLES M. HOSMER *vs.* HENRY C. FULLER.

Suffolk. November 13, 1896. — May 19, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Broker's Commission — Contract — Action.

Evidence that B., the owner of land, told A. that all over $7,500 "that you get for the land, or find a customer, you may have"; that A. afterwards offered the land for sale at $8,500 to certain persons, one of whom was C., who were about to form a corporation; that A. continued his negotiations with them, especially with C., for the sale, and notified B. that C. was the person with whom he was negotiating, and named the price; that a corporation was afterwards formed by these persons; that B. subsequently sold the land, through a lawyer, to the corporation, for $8,500; and that the check given in payment was signed by C. as treasurer, — will warrant a finding for A. in an action against B. to recover $1,000 for his services in procuring a purchaser for the land.

CONTRACT, upon an alleged agreement that, if the plaintiff would procure a purchaser for the defendant's land, he would pay him $1,000 for his services. At the trial in the Superior Court, before *Hammond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

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J. W. Cummings, (*E. A. McLaughlin* with him,) for the defendant.

W. H. Baker, for the plaintiff.

FIELD, C. J. The only exception is to the refusal of the presiding justice to direct a verdict for the defendant. It is plain that there was evidence for the jury that the defendant in July or August, 1892, agreed with the plaintiff that "all over $7,500 that you [the defendant] get for the land, or find a customer, you [the defendant] may have"; and that the plaintiff found some of "the gentlemen that were associating themselves together, or were going to, for the formation of" a brewery company in Lowell, and offered the land to them for sale. The exceptions recite that the plaintiff testified, among other things, as follows: "That a week or ten days afterwards [that is, after July or August, 1892] he called on Mr. Donovan and talked with him about the sale of the land; that he told Donovan the land was up there for sale, and it was adapted for brewing purposes; that Donovan asked him what the price was, and he told him $8,500; that Donovan replied that he knew the land; that it had been offered to him time and time again for a jackknife; that the plaintiff suggested it was a pretty good scheme to buy it, and that he and Donovan made an appointment to meet later on; that after this interview with Donovan the plaintiff notified the defendant that he had put the price on the land at $8,500, and that Donovan was the man with whom he was negotiating, and that the defendant said, 'All right, all right'; that on the 29th of August, the plaintiff met Mr. Donovan and a Mr. Broadbent at the Lowell Trust Company's office; that they had some conversation about going ahead and forming a brewing company, and that Broadbent and Donovan came to some sort of an arrangement; that he notified Donovan in the presence of Broadbent that the price of the land was $8,500, and that Donovan assented to it; that on the 13th day of September following, the plaintiff went to Lowell in response to an invitation of Donovan, and met him, a Mr. Bartlett (who was one of the owners of the land), and Mr. Harrigan; that they all went over to the land and looked it over; that they seemed pleased with it; that Donovan said that they were going to try the water to see whether it was suitable for brewery purposes, and they asked the plaintiff to locate where he thought was the best place to drive

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the well, so as to test the water, and if it proved to be what was wanted they would not have to dig another well; that the plaintiff did this; that Mr. Donovan said that if the water was all right they would take the land, and that the brewing company was to be organized under the laws of West Virginia; that at that time there was no brewery in the city of Lowell, and that the corporation was going to be formed as soon as they decided the question of water; that after this meeting with Donovan he again saw the defendant and told him that Donovan had been out to see the land and had expressed himself satisfied and was going to have the water tested, and that in witness's opinion there was no doubt but Donovan was going to take it, and the defendant said, 'All right,' and that he (plaintiff) told defendant that the water analysis was all right for brewery purposes; that he saw Donovan for the last time with reference to this land some time about the 1st of November, 1892; that before he first met the defendant, the plaintiff knew that Broadbent and Donovan contemplated the erection of a brewery at Lowell (Broadbent to be brewer), and they mentioned the names of Mr. Joyce and Mr. Curran as going to take hold with them; . . . that he called upon Donovan because he was recommended to him as the man who would be likely to take hold of the enterprise of starting a brewery, and that Donovan agreed to go ahead and raise the money to put into the brewery; that he was to raise one hundred or one hundred and fifty thousand dollars if necessary; that he, plaintiff, went to live at Philadelphia in the latter part of October, 1892, and did not return to Lowell again until the latter part of April or the beginning of May, 1893; that the last time he had any talk with the defendant was in the fall of 1892, somewhere about September; and that in the latter part of February, 1893, he wrote to the defendant from Philadelphia, and also wrote to the defendant at other times."

The plaintiff also put in evidence a copy of the articles of incorporation of the Consumers' Brewing Company under the laws of West Virginia, in which it appears that the capital stock was to be $300,000 of which 650 shares of $100 each were subscribed for; Donovan, Joyce, Curran, and Maurice A. Hanagan subscribing each for 100 shares, one Berry and George M. Harrigan subscribing each for 100 shares, and one Coffey subscribing for 50 shares. The agreement of these persons to become a corporation

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is dated January 26, 1893, and the certificate of incorporation is dated February 15, 1893.

The defendant testified, among other things, "that in December, 1892, Mr. E. B. Quinn, at that time an attorney in Lowell, came to see him about the purchase of the land for the Consumers' Brewing Company, and that Mr. Quinn made the bargain with him for the sale of the real estate to that company; that he made the purchase for $8,500; . . . that he received $8,500 in cash, in payment for the land; that he did not know that Mr. Donovan had ever been to see the land before he, the defendant, had talked with Mr. Quinn; that all the negotiations for the sale of the land to the Consumers' Brewing Company were had with Mr. Quinn; that the plaintiff never mentioned Mr. Donovan in connection with the brewery or the brewing business; that he first learned that Mr. Donovan was an incorporator in the Consumers' Brewing Company in May or June, 1893; and that was the first he knew about Donovan having anything to do with it; . . . that he had no talk with Mr. Joyce and Mr. Coffey until the deeds were passed; . . . that Quinn, the lawyer who represented the Consumers' Brewing Company or the syndicate, first saw the witness about the land in December, 1892; that Mr. Hosmer met him at one time and told him that he had been over to see the land with a party, but did not mention the name of the party; that Mr. Hosmer, up to the time the deeds were passed, wrote him letters, which letters were destroyed by the witness accidentally; that from December, 1892, to March 21, 1893, he negotiated with no one else except Mr. Quinn concerning the same property; that Mr. Joyce was present when the check for $8,500 was paid him by Mr. Quinn; and that Mr. Quinn was from a month to six weeks looking up the title of this land prior to March, 1893."

The check given in payment for the land was on the Lowell Trust Company, of which Donovan was president, but it was signed by Donovan as treasurer and Joyce as president, apparently as officers of the Consumers' Brewing Company. The deed to the Brewing Company was dated March 21, 1893, and the consideration expressed in it was $8,500. The plaintiff also put in evidence a postal card addressed to him by the defendant, as follows:

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"March 11, 1893.

"Dear Sir, — The reason you have not heard from me is, I have nothing to say. I am waiting now for a final decision in the matter in question. Have expected to get something definite every day, but have not yet reached that point. H. C. Fuller."

From this evidence the jury properly could find that the Consumers' Brewing Company was the corporation Donovan intended to form when he talked with the plaintiff about buying the land; that Donovan's intention was either to buy the land for the company or to have the company buy the land, and that the defendant in selling the land to the company knew he was effecting a sale as a result of the negotiations which the plaintiff had had with some of the principal incorporators. The jury also properly could find from the evidence that the plaintiff's efforts were the efficient cause of the purchase by the company. See *Desmond* v. *Stebbins*, 140 Mass. 339; *Gleason* v. *Nelson*, 162 Mass. 245; *Dowling* v. *Morrill*, 165 Mass. 491.

Exceptions overruled.

CATHERINE KENNEY *vs.* HINGHAM CORDAGE COMPANY.

Suffolk. January 14, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Master and Servant — Assumption of Obvious Risk.

At the trial of an action for personal injuries received by the plaintiff while in the employ of the defendant, in consequence of having his clothing caught in a pulley and belt on a machine by which he was standing while working on another machine, there was evidence that, when injured, the plaintiff, who was an adult, had been employed for about two months as a spinner in the defendant's cordage factory, previous to which for four years he had been so employed, on machines of substantially similar character and operation, in another cordage factory; that, when injured, he was standing in a narrow passage between two machines, from one of which he was removing a bobbin; and that, before he had begun to work for the defendant, he had questioned the safety of this passage, but was assured by the defendant's superintendent of the safety both of the passage and of the machinery. The plaintiff testified that he worked every working day on the same machine by which he was injured during the whole period of his employment; that he knew the belt was there; that he had

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seen it and the pulley; that when he stepped into the passage he knew that the machine behind him was running; and that there was nothing about the belt and the pulleys which he could not have seen had he looked. *Held*, that the plaintiff assumed an obvious risk, and that the action could not be maintained.

In determining whether the risks of an employment are so obvious as to be assumed by an employee, the question is not whether the employee has actually observed, and by a conscious act of the will assumed, all of the risks involved, but whether such risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, having regard to the age, intelligence, and experience of the employee, he could have seen and understood had he looked for them, and such as, having seen, he must have appreciated.

TORT, for personal injuries received by the plaintiff on October 10, 1894, while in the employ of the defendant. The declaration was under the employers' liability act, St. 1887, c. 270. Trial in the Superior Court, before *Mason*, C. J., who allowed a bill of exceptions, which, so far as material, is as follows.

The plaintiff when injured was twenty-five years of age, and had been employed by the defendant as a spinner since the 12th of the preceding August, and previous to that time she had for four years been similarly employed by the Suffolk Cordage Company in Chelsea, and had there worked on machines which, though differing in some respects from those of the defendant, resembled them in their general character and operation. At the time of the accident, the plaintiff, while engaged in taking a bobbin out of the machine on which she worked, was standing in a passageway between that machine and another, the width of which was variously stated as from ten to twenty-two inches. While so standing there her dress was caught by a rapidly revolving cross belt and drawn into the machine behind her, and she received the injuries complained of. Before she began to work for the defendant she observed the narrowness of the space between the machines, and asked the defendant's superintendent "if the passage was not too narrow between the two machines; he said, No, he did not think it was. And I asked him if there was not any danger in it, and he said, Not at all, that they were as safe as the machinery in Chelsea was." The plaintiff also asked the defendant's superintendent "if the belt was not dangerous in there," to which he replied that there was "no danger whatever, that it was perfectly safe." The plaintiff testified as follows: "I worked on the same machine I was hurt

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on every working day, from August 15 till I was hurt, . . . had seen the belt and pulley; such belts and pulleys were on all the machines there. . . . I knew the belt was there, had been between those machines every working day from the 15th of August to the 10th of October; . . . nothing different that day from any other; knew the machine was running behind me when I stepped in; . . . there was nothing about the belt and pulleys I could not have seen if I had looked for them, and I knew the belt was there. . . . Never saw a cross belt before I went to work at Hingham"; and that, until the accident she "did not know there was any danger or any [thing] in the way of machinery behind that clothing could be caught in." It further appeared that a crossed belt was more dangerous, and more likely to catch clothing, than a straight belt. This was all the material evidence in the case.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

T. W. Proctor, for the defendant.

P. B. Kiernan, for the plaintiff.

MORTON, J. The space in which the plaintiff worked was narrow, and there was danger, which might have been avoided by boxing the pulleys and belt, that such an accident as occurred to the plaintiff might happen.

But we think that the risk was an obvious one, and that the plaintiff must be held to have assumed it. At the time of the injury she was twenty-five years of age, and for aught that appears was of average intelligence, and before entering the defendant's employment had worked for four years for the Suffolk Cordage Company in Chelsea, doing the same kind of work as that which she was doing for the defendant when she was hurt. Though the machines of the Suffolk Company differed in some respects from those of the defendant, the machines of the two companies resembled each other in their general character and operation, so that the plaintiff cannot be regarded as an inexperienced person set to work on machinery with which she was unacquainted. The narrowness of the space between the machines was obvious to any one. And the plaintiff's questions to the superintendent before she went to work showed that she observed it, and also the possible danger from it and from the

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belt. The answers of the superintendent, that he did not think that the space was too narrow, and that there was no danger, and that "it [the belt] was perfectly safe," and that "they [the machines] were as safe as the machinery in Chelsea was," could not operate, six weeks or more after, to relieve the plaintiff from the assumption of risks which then at least were or should have been obvious to her, whatever might have been the result, if the accident had occurred immediately upon or soon after her entering the defendant's service, and while it naturally might be supposed that she was relying to some extent on the answers of the superintendent. See *Haley* v. *Case*, 142 Mass. 316.

It appeared that the belt in which the plaintiff's clothes were caught was a crossed belt, and that crossed belts are more dangerous than straight belts; and the plaintiff testified that she had never seen a crossed belt before she went to work for defendant, and that until the accident she "did not know there was any danger or any [thing] in the way of machinery behind that clothing could be caught in." But she also testified: "I worked on the same machine I was hurt on every working day, from August 15 till I was hurt [which was October 10], . . . had seen the belt and pulley; such belts and pulleys were on all the machines there; . . . I knew the belt was there, had been between those machines every working day from the 15th of August to the 10th of October; . . . nothing different that day from any other; knew the machine was running behind me when I stepped in; . . . there was nothing about the belt and pulleys I could not have seen if I had looked for them, and I knew the belt was there." It thus appeared from the plaintiff's testimony that there was nothing about the machines, or their position, or the belts and pulleys which she did not know, or might not have known if she had looked. In other words the risks were all obvious ones. No change was made before the accident, but everything remained as it was when she went to work. The crossed belt was more dangerous than a straight belt would have been, but the danger even from a straight belt would have been great. The precise amount of danger added by the crossing of the belt would not seem to be especially important. *Connelly* v. *Hamilton Woolen Co.* 163 Mass. 156. Machinery and belts of any kind in rapid motion have various elements of danger to those

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employed about them. And the question in each case is not whether the employee has actually observed and by a conscious act of the will assumed all of the risks involved, but whether the risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, taking his age, intelligence, and experience into account, he must be held to have appreciated if he saw, and such as, if he did not see, he could have seen and understood if he had looked. If the risks are of this character, then they are said to be obvious, and the employee assumes them. *Ruchinsky* v. *French*, *ante*, 68. *Vining* v. *New York & New England Railroad*, 167 Mass. 539. *Young* v. *Miller*, 167 Mass. 224. *Content* v. *New York, New Haven, & Hartford Railroad*, 165 Mass. 267. *Austin* v. *Boston & Maine Railroad*, 164 Mass. 282. *Connelly* v. *Hamilton Woolen Co.* 163 Mass. 156. *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287. *Fisk* v. *Fitchburg Railroad*, 158 Mass. 238. *Thain* v. *Old Colony Railroad*, 161 Mass. 353. *Gleason* v. *New York & New England Railroad*, 159 Mass. 68. *Patnode* v. *Warren Cotton Mills*, 157 Mass. 283. We think that the present case falls within the rules thus laid down.

Exceptions were taken to the admission of certain evidence, but as the questions thus presented may not arise upon a new trial, if there should be one, we do not deem it necessary to consider them. *Exceptions sustained.*

JAMES E. WALL *vs.* METROPOLITAN STOCK EXCHANGE.

Suffolk. January 14, 15, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Suffolk. March 5, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Remedial Statute — Wagering Contract — Release under Seal.

The St. 1890, c. 437, entitled "An Act relative to wagering contracts in securities and commodities," is a remedial and not a penal statute, and the cause of action

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given thereby, being the property of the person entitled to sue and no other person having any interest therein, may be discharged by him by a sufficient release under seal.

CONTRACT, under St. 1890, c. 437, entitled "An Act relative to wagering contracts in securities and commodities," to recover certain sums of money paid by the plaintiff between February 2, 1893, and July 25, 1893, for securities sold to him upon margin by the defendant. The defendant in bar to the action pleaded certain releases under seal signed by the plaintiff.

Each release was similar in every respect to the following, except as to date and amount; and each release was dated, executed, and delivered subsequent to July 25, 1893.

"Boston, Nov. 11, 1893.

"Received of the Metropolitan Stock Exchange, dollars, in full of all demands, and I hereby release the Metropolitan Stock Exchange from all causes of action and claims to this date.

"Witness my hand and seal."

"$21.25"

The case was referred to an auditor, who found that the plaintiff would be entitled to recover of the defendant the sums claimed in his declaration, provided he had not executed the releases referred to, ruled that the releases constituted a complete bar to the plaintiff's action, and found for the defendant. At the trial in the Superior Court, without a jury, before *Fessenden*, J., the auditor's report was the only evidence introduced. The plaintiff requested the judge to rule that the releases did not constitute a bar to the plaintiff's cause of action. The judge refused so to rule and found for the defendant; and the plaintiff alleged exceptions.

W. B. Rich, for the plaintiff.

J. Cavanagh, for the defendant.

FIELD, C. J. We are of opinion that St. 1890, c. 437, is a remedial and not a penal statute. The right given by the second section of the statute is given to the person who contracts to buy or sell upon credit or upon margin, etc., or to the person who employs another so to buy and sell, etc., and it is a right to "sue for and recover in an action of contract from the other party to the contract, or from the person so employed, any payment made or the value of anything delivered," etc. At common

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law no such right of action existed because the parties were considered *in pari delicto.* No penalty is imposed by the statute which the Commonwealth or any person other than the person who makes the payment or delivers the thing of value can enforce, and the amount to be recovered is the amount of the payment made or the value of the property delivered.

The statute has been held to be constitutional as a statute intended to suppress a species of gambling. *Crandell* v. *White*, 164 Mass. 54.

As the statute was passed in order to suppress transactions which were deemed to be against public policy, it may be that contracts made in advance not to take advantage of the statute would be held void. *Bosler* v. *Rheem*, 72 Penn. St. 54. See *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *Fidelity Mutual Life Association* v. *Ficklin*, 74 Md. 172; *Hermany* v. *Fidelity Mutual Life Association*, 151 Penn. St. 17. But after a cause of action under the statute has accrued, it is at the option of the person to whom the right to sue is given whether he will sue or not, and if he neglects to sue no other person can sue. The cause of action being thus the property of the person entitled to sue, and no other person having any interest in it, he can discharge or release it. The releases in this case, being under seal, were sufficient. *Aldrich* v. *Parnell*, 147 Mass. 409. *Leddy* v. *Barney*, 139 Mass. 394. *Squires* v. *Amherst*, 145 Mass. 192. *Cole* v. *Groves*, 134 Mass. 471. *Tamplin* v. *Wentworth*, 99 Mass. 63. *Gray* v. *Bennett*, 3 Met. 522. *Mitchell* v. *Clapp*, 12 Cush. 278. *Getman* v. *Second National Bank of Oswego*, 89 N. Y. 136. *Exceptions overruled.**

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* A similar decision was made in Suffolk, May 21, 1897, in the case of

JOHN SHEA *vs.* METROPOLITAN STOCK EXCHANGE.

CONTRACT, under St. 1890, c. 437, to recover payments made by the plaintiff to the defendant, who in bar to the action pleaded certain releases under seal, of which the following is a copy:

"Boston, 4–14, 1896.

"Received of the Metropolitan Stock Exchange 12.50 dollars, in full of all demands under within contract, and I hereby release and discharge the Metropolitan Stock Exchange, its officers, agents, and servants, and each of them, therefrom, and also from any and all rights of action, claim, or demand under or by virtue of Chapter 437 of Acts of Massachusetts for the year 1890, or any amendment thereof, for any payment at any time hereto-

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MARGARET C. SPADE *vs.* LYNN AND BOSTON RAILROAD COMPANY.

Suffolk. January 15, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

No Recovery for Bodily Injury caused by Fright and Mental Disturbance.

In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright and mental disturbance.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. The declaration alleged that while, on February 16, 1895, the plaintiff was a passenger in the defendant's car, and in the exercise of due care, "one of the defendant's agents or servants, in attempting to remove from said car a certain person claimed and alleged by said defendant's agent to be noisy, turbulent, and unfit to remain as a passenger in said car, conducted himself with such carelessness, negligence, and with the use of such unnecessary force, that said agent and servant, acting thus negligently, created a disorder, disturbance, and quarrel in said car, and thereby frightened the plaintiff and

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fore made or value of anything at any time heretofore delivered either on, within or any other contract or transaction whatever, and I covenant never to sue therefor them or either or any of them.

"Witness my hand and seal this

"$12.50. 189 "

At the trial in the Superior Court, without a jury, before *Hardy*, J., the plaintiff testified that he was obliged to sign the releases before he could get a return of his margin or his gain; and the defendant admitted that it was its practice and a part of its business to have such releases signed so as to avoid liability under St. 1890, c. 437. The judge ruled that "the releases under seal dated April 14, 1896, are a bar to the recovery by the plaintiff of any sums of money for or on account of any transactions had prior to the time of execution of said releases," and found for the defendant. The plaintiff alleged exceptions.

W. H. Brown, for the plaintiff.

I. R. Clark & J. Cavanagh, for the defendant.

FIELD, C. J. The case is governed by *Wall* v. *Metropolitan Stock Exchange*, *ante*, 282. *Exceptions overruled.*

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subjected her to a severe nervous shock, by which nervous shock the plaintiff was physically prostrated and suffered, and has continued to suffer, great mental and physical pain and anguish, and has been put to great expense."

At the trial in the Superior Court, before *Mason*, C. J., there was evidence tending to show that the accident complained of occurred while the plaintiff was being conveyed to her home in Chelsea upon a crowded car of the defendant company, after 10.30 P. M., on February 16, 1895.

The plaintiff testified in substance that two men somewhat intoxicated were allowed, during a part of the trip from Boston to Chelsea, to stand near her in the car, one of them in a position where he was leaning or lurching toward her in such a way that she was obliged to move to avoid him; that a controversy occurred between one of the intoxicated persons and the conductor about the payment of a fare, and that the conductor said to the intoxicated person, after some other conversation, that if he did not keep quiet he would throw him off the car, even if he broke his head; that as she neared the place where she was to leave the car, "the first thing I saw was the conductor . . . grab this man by the collar; the next thing I saw was . . . another man from the other end of the car, whom I did not know, come down; but the other man, as he pulled him, lurched over on me; then it seemed as though I turned to solid ice. My breath was cut right off. I could not have spoken; I tried to speak, but I chilled so I kept growing stiffer and stiffer, until I did not know, I do not know when they got me off the car." She further stated that nothing had occurred of any sort or description that gave any suggestion of a warning that the conductor was going to rush at the drunken man at this time; that he did it "just as quick as a man could jump"; and that the intoxicated person standing directly in front of her "lurched over so it kind of pushed me back against the car."

The plaintiff further testified:

"*Q.* Your body was not injured in any way by contact with this man? *A.* Oh, no, I was not injured. There were not any marks on me, anything like that.

"*Q.* You suffered no pain from this man touching you? *A.* No, not any injury from that.

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"*Q.* What was the cause of this man's touching you, the one that lurched forward? *A.* When the conductor jumped and grabbed this man that I told about, on the opposite side of the car, that made a commotion, and as he twitched him it pushed this other man over on to me."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

The case was argued at the bar in January, 1897, and afterwards was submitted on briefs to all the justices.

C. K. Cobb, for the defendant.

S. L. Whipple, (*W. R. Sears* with him,) for the plaintiff.

ALLEN, J. This case presents a question which has not heretofore been determined in this Commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress occasioned by the negligence of another, which does not result in bodily injury; but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury.

In *Canning* v. *Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, that he could not recover if he sustained no injury to his person, but merely incurred risk and peril which caused fright and mental suffering. In *Warren* v. *Boston & Maine Railroad*, 163 Mass. 484, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground, and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not therefore a case of mere fright, and resulting nervous shock.

The case calls for a consideration of the real ground upon which the liability or non-liability of a defendant guilty of neg-

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ligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others.

It must also be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such a cause. Great emotion may and sometimes does produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.

It would seem therefore that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if in its general application it will not as a usual result serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered.

Rules of law respecting the recovery of damages are framed

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with reference to the just rights of both parties; not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travellers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop* v. *Allsop*, 5 H. & N. 534, 538, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied. *Lombard* v. *Lennox*, 155 Mass. 70. *White* v. *Dresser*, 135 Mass. 150. *Fillebrown* v. *Hoar*, 124 Mass. 580. *Derry* v. *Flitner*, 118 Mass. 131. *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469, 475. *Wyman* v. *Leavitt*, 71 Maine, 227. *Ellis* v. *Cleveland*, 55 Vt. 358. *Phillips* v. *Dickerson*, 85 Ill. 11. *Hampton* v. *Jones*, 58 Iowa, 317. *Renner* v. *Canfield*, 36 Minn. 90. *Lynch* v. *Knight*, 9 H. L. Cas. 577, 591, 595, 598. *The Notting Hill*, 9 P. D. 105. *Hobbs* v. *London & Southwestern Railway*, L. R. 10 Q. B. 111, 122.

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The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions. *Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 222. *Mitchell* v. *Rochester Railway*, 151 N. Y. 107. *Ewing* v. *Pittsburg, Cincinnati, Chicago, & St. Louis Railway*, 147 Penn. St. 40. *Haile* v. *Texas & Pacific Railway*, 60 Fed. Rep. 557.

In the following cases, a different view was taken. *Bell* v. *Great Northern Railway*, 26 L. R. (Ir.) 428. *Purcell* v. *St. Paul City Railway*, 48 Minn. 134. *Fitzpatrick* v. *Great Western Railway*, 12 U. C. Q. B. 645. See also Beven, Negligence, 77 *et seq.*

It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard* v. *Lennox*, and *Fillebrown* v. *Hoar*, already cited. *Meagher* v. *Driscoll*, 99 Mass. 281.

In the present case, no such considerations entered into the rulings or were presented by the facts. The entry therefore must be,

Exceptions sustained.

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HARVEY P. WASSERBOEHR *vs.* WILLIAM T. MORGAN.

Suffolk. January 21, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Intoxicating Liquors — Illegal Sale — Evidence — Action — Finding — Inference.

In an action for the price of intoxicating liquors sold here and sent to a dealer in liquors in another State, the statutes of that State, prohibiting the sale of such liquors there by any person not an agent of a town for that purpose, are properly admitted in evidence; and evidence that the buyer had never been such an agent is also admissible.

If a wholesale dealer in intoxicating liquors in this Commonwealth is accustomed to sell liquors to retail dealers in another State, the statutes of which prohibit the sale of such liquors except by town agents, in an action by him for the price of liquors sold, through an agent residing in that State, to a person entering into the liquor business there, it is competent for the judge, sitting without a jury, to find that both the plaintiff and his agent knew of the prohibitory law of the other State and that the defendant was not a town agent; and to infer that the plaintiff knew that the defendant intended to sell the liquors illegally, and that the plaintiff sold the liquors with a view to such resale by the defendant.

CONTRACT, upon an account annexed, for intoxicating liquors sold in February and March, 1893. The answer contained a general denial, and also alleged that the sale was illegal. Trial in the Superior Court, without a jury, before *Bond*, J., who allowed a bill of exceptions, in substance as follows.

Edward Schwab, called by the plaintiff as a witness, testified that he had been employed by the plaintiff as a bookkeeper during the last ten or twelve years in Boston, and knew the defendant by having met him at the place of business of the plaintiff; that the goods described in the account on which this action was brought were shipped from the plaintiff's place of business by his directions, and he made the entries on the plaintiff's books for the various items; that the goods were delivered to an express, and directed to the defendant, who resided in Manchester, New Hampshire; that he afterwards saw the defendant in the early part of January, 1894, at the office of the plaintiff in Boston; that he had a talk with him about the bill; that the defendant said that he came here to pacify the plaintiff, to tell

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him not to be afraid about the bill, that he would surely pay it; and that they never sold any other goods besides that bill to the defendant.

On cross-examination, the witness testified that the defendant's name appeared upon the books of the plaintiff as residing in Manchester, New Hampshire; that he never saw the defendant before his order was taken; that it was taken by the plaintiff's selling agent, one Boire, in Manchester, where he lived, and sent by mail for the plaintiff's approval; that after the order had been approved by the plaintiff, the witness made out the tags, and shipped the goods by an express which runs to Manchester; that he knew that the defendant was supposed to live in Manchester; that he had a conversation with the defendant at the plaintiff's office; that he said business had been bad with him up there; that the witness was not aware that he spoke of the authorities interfering with his selling and shutting him up; that he did not know that he was in the liquor business, except by his admission in the plaintiff's office when he first saw him; that he did not know that he was in the liquor business when they first got his order, that he only suspected it; and that the freight on this bill was not paid by the plaintiff, but must have been paid by the defendant.

The plaintiff testified that he never knew the defendant until he saw him in court at the day of the trial, where he was pointed out; that he first knew of him when he received a letter from his salesman, Boire; that he was informed that the defendant wished to buy some liquors, that being the plaintiff's business; that no one had authority to sell goods without his approval, and all orders were subject to his approval; that he did finally approve the order, and gave directions to his bookkeeper about shipping the goods; that he told his bookkeeper to have the order filled as it now stands on the books, and see that it was shipped; that only $120 of the bill had been paid, and that was paid by the defendant's check; that he had never sold any goods to the defendant before this bill, and none since; and that no bill was ever presented to him for payment of the freight.

On cross-examination, the plaintiff testified that Boire was his selling agent, and had been for a number of years; that Manchester was his home, as he understood it; that he did not know

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whether he had twenty or twenty-five customers in Manchester, or not; that he sold some goods in Manchester through Boire at the time; that he would not give the salesman positive authority to sell goods to whom he pleased; that he looked up the defendant's credit in a measure, and finally decided to sell him the goods; that he relied on what Boire told him by letter; that he told him enough so that he trusted the defendant for over $500; that he did not then know that the defendant was in the liquor business; and that that letter said that the defendant was going into business, and that he was fitting up a place to go into business at Manchester.

The defendant was called by the plaintiff, and testified that he received the goods from Boston named in the bill; and that he had only paid $120, and that by check, on the bill.

On cross-examination, he testified that he bought the goods of Boire at Manchester; that he was then fixing up a place to go into the liquor business; that he had conversation with Boire about it; that he told him what he was going to do; that he told him that he was going to fix up there and sell liquor, and that he sold him these goods; that it was after that that he sold him these goods; that he (Boire) saw the place he was fixing up; that he was down there; that when the goods came, he thought that they were addressed to 58 West Summer Street; that that is the same place that he was fixing up to go into business; and that these goods were used in that place of business.

The defendant offered in evidence the Public Statutes of New Hampshire of 1891, c. 112, §§ 15–21.

The plaintiff objected to the introduction of this statute, both for want of proof and on the ground that the sale was in Massachusetts. The judge admitted the statute; and the plaintiff excepted.

The defendant was recalled by his counsel, and asked this question: "Were you, at the time that you bought these goods, or at any time have you ever been, town agent of a town or city of New Hampshire?"

The question was objected to, and admitted; and the plaintiff excepted. The defendant answered, "No, sir; I was not."

The plaintiff asked the judge to rule that, on all the evidence in the case, the defendant had not made out a legal defence to the

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action; and that the finding should be for the plaintiff for the full amount of the claim. The judge refused so to rule, and found for the defendant; and the plaintiff alleged exceptions.

E. G. McInnes, (*C. S. Lincoln* with him,) for the plaintiff.

W. R. Sears, for the defendant.

FIELD, C. J. This action was tried by the court without a jury, and the finding was for the defendant. The view most favorable for the plaintiff is, that the evidence showed that the sale of the liquors was made, not in New Hampshire, but in Massachusetts, to the defendant, who lived in New Hampshire, with the knowledge or belief on the part of the plaintiff that the defendant intended to sell the liquors at his place of business in Manchester, New Hampshire. The plaintiff contends that there was no evidence on which the court could properly find that the plaintiff knew that the laws of New Hampshire prohibited the sale of intoxicating liquors, and that the defendant intended to sell the liquors at Manchester in violation of these laws, and no evidence that the plaintiff made the sale with the view or intention that the defendant should so resell them.

The defendant offered in evidence the Public Statutes of the State of New Hampshire of the year 1891, c. 112, §§ 15–21. They purport to have been enacted by the Senate and House of Representatives of the State of New Hampshire in General Court convened, and to have been approved by the Governor on April 11, 1891; and it is provided therein that they shall take effect on the first day of January then next ensuing. These statutes prohibit and make criminal the selling or keeping for sale of any spirituous liquors, or of lager beer or other malt liquors, by any person not an agent of a town for the purpose of selling spirituous liquors. The statutes were rightly admitted in evidence, as was the testimony that the defendant never had been a town agent in New Hampshire. Pub. Sts. c. 169, § 71. One objection made at the argument in this court to the admission of the statutes in evidence is that they were not properly pleaded in the answer of the defendant, but the objection at the trial was not put on this ground.

The declaration is on an account annexed for liquors sold at different times, from February 1, 1893, to March 15, 1893. The order for the liquors was taken by one Boire, the plaintiff's sell-

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ing agent, who lived in Manchester, and the plaintiff testified that "he sold some goods in Manchester through Boire at the time"; that "he did not know whether he had twenty or twenty-five customers in Manchester, or not." The defendant testified, among other things, as follows: "that he bought the goods of Boire at Manchester; that he was then fixing up a place to go into the liquor business; that he had conversation with Boire about it; that he told him what he was going to do; that he told him that he was going to fix up there and sell liquor, and that he sold him these goods; that it was after that that he sold him these goods; that he (Boire) saw the place he was fixing up; that he was down there; that when the goods came, he thought that they were addressed to 58 West Summer Street; that that is the same place that he was fixing up to go into business; and that these goods were used in that place of business."

It is not a violent inference of fact from the evidence that a wholesale liquor dealer in Boston, Massachusetts, accustomed as the plaintiff was to selling intoxicating liquors to retail dealers in New Hampshire, knew whether that State by its statutes prohibited the sale of such liquors except by town agents, or licensed the sale, or had no statutes on the subject; and it is a still less violent inference of fact that Boire, who lived in Manchester, New Hampshire, and was the selling agent of the plaintiff, knew what the statutory law of New Hampshire was on the subject, and the knowledge of the agent is the knowledge of the principal. *Suit* v. *Woodhall*, 113 Mass. 391. We think that it was competent for the court trying the case without a jury to find on the evidence that both the plaintiff and Boire knew that the statutes of New Hampshire prohibited the sale of intoxicating or spirituous liquors except by town agents, and that the defendant was not a town agent. The further inference that the plaintiff knew that the defendant intended to sell the liquors in violation of the statutes of New Hampshire, and that the plaintiff sold the liquors to the defendant with a view to such resale, is one that the court properly could make. If the liquors had been imported liquors, sold in the original package, we think that there would have been some evidence of it, and there was no such evidence. See *Graves* v. *Johnson*, 156 Mass. 211.

Exceptions overruled.

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BENJAMIN WHITE *vs.* FREDERICK H. SANDER.
EMMA WHITE *vs.* SAME.

Middlesex. January 22, 25, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

No Recovery for Bodily Injury caused by Fright and Mental Disturbance.

In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright and mental disturbance.

TWO ACTIONS OF TORT, that of the female plaintiff being to recover damages for injuries alleged to have been caused her by the throwing of a stone by the defendant through a closed blind into a room in which she then was, and the action of the male plaintiff, who was her husband, being to recover damages for the loss of his wife's services caused by said act.

At the trial in the Superior Court, before *Dunbar*, J., the defendant asked the judge to instruct the jury that the plaintiffs were not entitled to recover damages by reason of either mental suffering or bodily injury, if any, resulting from mere fright of the female plaintiff, produced by the throwing of the stone by the defendant into the building. The judge refused so to rule; and the defendant excepted.

The judge instructed the jury, in substance, that the plaintiffs were entitled to recover for physical injury resulting from the wrongful act of the defendant, although such physical injury might have been the result of mental shock produced by such act; and the defendant excepted.

The judge also instructed the jury, in substance, that the plaintiffs were not entitled to recover damages by reason of mere fright occasioned by the defendant's act.

The jury returned a verdict for the male plaintiff in the sum of $179.30, and for the female plaintiff in the sum of $847.47; and the defendant alleged exceptions. The facts appear in the opinion.

The cases were argued at the bar in January, 1897, and afterwards were submitted on briefs to all the justices.

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J. F. Pickering, for the defendant.

J. M. Lesser, (*G. H. Fall* with him,) for the plaintiffs.

ALLEN, J. There was no evidence that the defendant had any intention to injure the female plaintiff, or that he was aware of her delicate condition of health. The house did not belong to her, but to her father, with whom the defendant had had an altercation. The defendant's declared purpose was to injure the house, and he threw a large stone against it in her presence. She then ran into the front room with her little child, whereupon a large stone was wilfully thrown by the defendant, which passed through one of the blinds, all of the blinds upon the front windows being closed. This greatly frightened her, though she was not struck or touched. We do not understand by the bill of exceptions that the defendant knew that she was in that room, or that he had any purpose either to hit or to frighten her, or that the case was designed to present to us an intentional injury to her or to her property. These elements being absent, the defendant was not responsible in damages for her fright, or the consequent injury to her health. *Spade* v. *Lynn & Boston Railroad*, *ante*, 285. *Exceptions sustained.*

JACOB L. BAILEY *vs.* SAMUEL J. EDMUNDSON.

Middlesex. January 26, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Error — Practice — Rule of Superior Court — Default — Entry of Judgment.

The plea of *in nullo est erratum* to a writ of error raises only issues of law, and the case should immediately be transferred to the full court, without a hearing by a single justice.

Under the 27th Rule of the Superior Court, it is within the power of that court to enter judgment in an action in which the defendant has been defaulted on the first Monday of the following month, although it is within four legal days after the default.

WRIT OF ERROR, to reverse a judgment of the Superior Court rendered in an action of tort by the defendant in error against the plaintiff in error. The facts appear in the opinion.

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J. H. Hurley, for the defendant in error.

P. J. Casey, for the plaintiff in error, submitted the case on a brief.

FIELD, C. J. The defendant in error pleaded *in nullo est erratum*. The case was heard by a single justice of this court, who affirmed the judgment of the Superior Court, and the defendant in error appealed to the full court. But on filing the plea, the case should immediately have been transferred to the full court, as the plea raises only issues of law. Pub. Sts. c. 150, § 7. *Tufts* v. *Newton*, 119 Mass. 476.

The error assigned is that the judgment of the Superior Court was rendered upon the default of the original defendant, now the plaintiff in error, within four legal days after the default. It appears from the record that the original defendant was defaulted in the Superior Court on November 27, 1895, and the court assessed the damages, as we infer, on that day. The judgment was entered on December 2, 1895. November 27 was Wednesday, the next day was Thursday, which was Thanksgiving day, a legal holiday; November 29 was Friday, November 30, Saturday, December 1, Sunday, and December 2, Monday. If Thanksgiving day and Sunday are not counted, excluding the day of the default there were but two days from the day of the default before December 2; if Thanksgiving day and Sunday are counted, there were four days from the day of the default before December 2. See Pub. Sts. c. 160, § 4.

Pub. Sts. c. 171, § 1, is as follows: "Every judgment shall be entered as of the last day of the term in which it is rendered, unless there is an express order of the court for the entry thereof on some other day; in which case, the day shall be noted by the clerk on his docket. The court may enter up judgment upon default at any time after four days from the day of the default." We assume that in reckoning the four days under this section of the statute neither Sunday nor Thanksgiving day was to be counted. But under this section of the statutes judgment was entered upon default as of the last day of the term, by a general order of the court, whether four days from the day of the default had elapsed or not. It was only when judgment upon default was entered in term, and before the last day of the term, that four days must elapse after the default before the judgment

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could be entered. See Pub. Sts. c. 167, §§ 45–47; *Herring* v. *Polley*, 8 Mass. 113; *Portland Bank* v. *Maine Bank*, 11 Mass. 204; *Coolidge* v. *Cary*, 14 Mass. 115.

By St. 1885, c. 384, § 2, terms in the Supreme Judicial Court and in the Superior Court were abolished, and business may be transacted at any time. Section 11 is as follows: "At any time after a default has been entered against the defendant in an action at law in either of the courts, the plaintiff may after four days have judgment entered as of course by the clerk, without any further order."

Section 12 is as follows: "The courts respectively may make general rules authorizing or directing, in such manner and subject to such provisions as they may think proper, the entry of judgment by the clerk without any further order in all or any of the cases in which judgment may, according to the present practice, be entered under a general order or at the end of a term as of course."

The 27th Common Law Rule of the Superior Court is as follows: "On the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court; and the court, or any justice, may at other times order judgment to be entered in any action." Under this rule the Superior Court could, by a general or special order, cause judgment after default to be entered in the original suit in this case on the first Monday of December, 1895.

The brief of the defendant in error states that on January 17, 1887, the Superior Court passed the following order: "Middlesex, ss. Ordered, that judgment be entered on the first Monday of every month, and on the next day thereafter when said Monday is a legal holiday, in all actions pending in said court which are then ripe for judgment, unless the party entitled thereto otherwise requests in writing." See *Dudley* v. *Keith*, 153 Mass. 104; *Norcross* v. *Crabtree*, 161 Mass. 55; *Hosmer* v. *Hoitt*, 161 Mass. 173.

Although this order is not before us on the record, still we might require it to be certified to us if we deemed it necessary. It is enough, however, that it appears from what is properly before us that it was within the power of the Superior Court to enter the judgment which was entered in the original suit on

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the first Monday of December, 1895. No error appears, and the original judgment must be affirmed, with costs, and interest at the rate of six per cent a year upon the amount recovered by the judgment. Pub. Sts. c. 187, § 7. *So ordered.*

ISRAEL GOLDIS *vs.* BERNARD F. GATELY.

Middlesex. March 2, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Arrest — Execution — Officer.

An arrest is valid which is made upon an execution that has been returned into court unsatisfied and its return entered upon the docket, and which is then redelivered before the return day by the clerk of the court to the officer, upon request, without an application to or an order of the court, a certificate authorizing such arrest having been granted subsequently after due proceedings.

TORT, for assault and battery and false imprisonment. The defendant, a constable, justified under an execution by virtue of which he arrested the plaintiff. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

W. H. Bent, for the plaintiff.

J. H. Carmichael, for the defendant.

ALLEN, J. An execution, dated July 18, 1895, issued by the police court of Lowell, and returnable within sixty days, and running against the body of the plaintiff in the usual form, was, on July 24, 1895, returned by the officer into court in no part satisfied; indorsements to that effect being made upon it by the officer, and by the attorney of the judgment creditor. The clerk of the court thereupon minuted upon the back of the execution the fact of the filing of the same, and entered upon the docket record of the case "Execution returned." On July 31, the officer or the attorney applied to the clerk, who thereupon redelivered the execution to him. No application was made to the court, nor

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was any order made by the court, that the execution should be so redelivered. But application was thereupon made to the court for a certificate authorizing the arrest of the defendant therein, on the ground that he had goods and estate which he did not intend to apply to the payment of the judgment creditor's claim. This application was accompanied by an affidavit made before the court, "in behalf of the judgment creditor named in the annexed execution," to the above effect. The court thereupon issued notice to the defendant therein to appear and submit to examination as provided by law. This notice referred in terms to the original execution, dated July 18, 1895, and was made returnable on August 6. On that day the judgment debtor did not appear, and the judge of the police court granted a certificate setting forth that, "after due hearing, the said court is satisfied there is reasonable cause to believe that the charges contained in the foregoing affidavit are true," and that the above mentioned notice had been issued, and that the judgment debtor had not appeared. The said notices were thereupon attached to the execution, and upon said execution on the following day the officer, Gately, who is the defendant in the present case, arrested the body of the judgment debtor, viz. the present plaintiff; and for this arrest the present action was brought. In all these proceedings no application was made to the court to annul or in any way to modify the effect of the filing of the execution and indorsements thereon by the constable, the attorney, and the clerk, or of the entry "Execution returned" upon the docket record, nor was the attention of the judge called to these facts by either party, nor does it appear that he made any adjudication thereupon, unless the same can be inferred from his issuing the two certificates above referred to. The only question presented to us is, whether the officer is to be protected for acting under the execution reissued under these circumstances.

It is quite clear that, after an execution has been served by an actual arrest of the body of the defendant therein, it cannot ordinarily be used further for the purpose of a new arrest or of seizing property. *Doane* v. *Bartlett*, 4 Allen, 74. *Doane* v. *Baker*, 6 Allen, 260. *Coburn* v. *Palmer*, 10 Cush. 273. *Kennedy* v. *Duncklee*, 1 Gray, 65. *Nowell* v. *Waitt*, 121 Mass. 554. *Loomis* v. *Storrs*, 4 Conn. 440. Under special circumstances,

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however, a rearrest was held valid, in *Little* v. *Newburyport Bank*, 14 Mass. 443.

In the present case, no service whatever of the execution had been made; it had simply been put into the officer's hands, and by him returned without service, several weeks before the return day. In taking further proceedings, it was simply a question whether the same execution should be reissued, or an alias execution taken out. The judgment creditor was entitled to an execution upon which his debtor could be arrested; and if he did not get it by a reissue of the existing execution, the return day of which was still quite remote, he was entitled to an alias. We find no statute which in terms or by any clear implication shows which is the proper course to pursue; and we have reason to think that the practice in different parts of the Commonwealth has not been uniform. Indeed, it is probable that few such cases have arisen, because usually, in case property cannot be found, and it is desired to arrest the body, proceedings for the arrest would be taken without returning the execution into court. But we see no strong objection to using the same execution for that purpose after it has been so returned without service. In *Roberts* v. *Church*, 17 Conn. 142, it was said to be an immemorial practice for the clerk to renew an execution by erasing the original date and inserting a new one. In *James* v. *Gurley*, 48 N. Y. 163, an officer after returning *nulla bona* upon an execution, procured the same from the clerk's office, with the consent of the plaintiff's attorney and of the clerk, and erased the return, and seized and sold property thereon. It was held that the execution was irregular, but not void, and that the officer could not refuse to answer for the money collected; and it was said that the court, upon application of the officer, could have authorized its withdrawal, and the cancellation of the return and filing, and that it would then have been a valid and regular process in his hands. This case depended somewhat on the statutes of the State. In *Pennington* v. *Yell*, 11 Ark. 212, it was held that, after a return of the first execution before the return day, there was no irregularity in issuing it again before the return day.

In the present case, it is quite probable that the judge of the police court examined the execution and saw for himself the officer's return thereon, and that he understood exactly what he

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was doing. Certainly there is no evidence and no presumption to the contrary. The affidavit which was made before the court in behalf of the judgment creditor referred in terms to the annexed execution, and it is probable that the execution was before the judge's eyes, though it would seem that the affidavit had not at that time been actually annexed. If necessary to make the reissue of the execution valid, it should now be assumed that the judge directly sanctioned that course of proceedings, on the ground that where things are done in the course of judicial administration which presuppose that certain other things have been done, there is a presumption in favor of the regularity of the proceedings.

But even if it were made conclusively to appear that the return upon the execution escaped the attention of the court, no harm was done by the reissue. Due proceedings were had with a view to an arrest, and authority to make such arrest was given. We are much inclined to think that the course pursued was free from valid objection; but all that we need decide is, that the officer was not bound to look beyond his precept, and might assume that all proper steps had been taken to make it valid. *Tellefsen* v. *Fee*, *ante*, 188. *Exceptions overruled.*

MINNIE E. SMITH *vs.* BARNEY FERGUSON & another.

Suffolk. March 2, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Motion to Dismiss for Want of Proper Service of Writ.

By Pub. Sts. c. 153, § 8, no exception lies to a judgment of the Superior Court overruling a motion to dismiss an action for want of proper service of the writ.

CONTRACT, upon a promissory note against Barney Ferguson and Barney Fagan. In the Superior Court the defendant Ferguson filed a motion to dismiss the action, on the ground "that there has been no sufficient service of said writ on either of said defendants, as appears by the officer's return on said writ." The

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motion was overruled, the defendant Ferguson appealed, and thereafter the court found for the plaintiff.

J. A. McGeough, for the defendant Ferguson.

J. H. Blanchard, for the plaintiff.

FIELD, C. J. The decision of the justice of the Superior Court overruling the motion to dismiss the action for the alleged reason that there had been no sufficient service of the writ was final. Pub. Sts. c. 158, § 8. *Kennedy* v. *Langdon*, 123 Mass. 193.

Appeal dismissed.

CLEMENS ELECTRICAL MANUFACTURING COMPANY *vs.* WILLIAM A. WALTON.

Bristol. March 8, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER,, JJ.

Petition to establish the Truth of Exceptions — Time of Entry — Entry Fee.

A petition to this court to establish the truth of exceptions was, on the nineteenth day after notice to the petitioner's attorney of the disallowance of the exceptions, presented at the office of the clerk of courts for the county of Bristol, with a request that it be immediately entered and filed, and, in the absence of the clerk, it was received by a person employed in his office, who indorsed thereon that it was filed and entered on that day. No entry fee was then paid or demanded, but, on the second day thereafter, upon notice received from the clerk that the petition was not filed or entered for the reason that no entry fee had been paid, the petitioner's attorney, whose office was in Boston, forwarded the entry fee by mail, and stated that it would have been paid when the petition was presented had it been understood that it was required. On the following day the entry fee was received by the clerk, who thereupon made an entry on the docket that the petition was on that day filed and entered. *Held*, that, on the facts, the petition was properly filed, within the meaning of Common Law Rule XXX., when it was presented and received at the office of the clerk.

Under St. 1891, c. 87, § 1, a fee of three dollars is payable to the clerk of courts upon the entry of a petition to establish the truth of exceptions.

The provisions of St. 1888, c. 257, § 8, that "the clerks of the courts shall collect all fees in advance," and of St. 1891, c. 87, § 1, that "no suit, action, libel for divorce, or petition shall be entered or filed by the clerk until said [entry] fee is paid," are directory to the clerks, and do not prescribe a condition precedent to the rights of parties under processes which have been duly entered in court without the payment of the proper fees in advance.

FIELD, C. J. In this action at law brought in the Superior Court for the county of Bristol, and tried by the court without

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a jury, the finding was for the plaintiff, and the defendant alleged exceptions. The exceptions were disallowed by the presiding justice of the Superior Court, and thereupon the defendant filed a petition in this court to establish the truth of the exceptions. Two motions were made in this court, one by the plaintiff that the petition be dismissed, the other by the defendant that a commissioner be appointed to hear the evidence and report whether the exceptions alleged have been established as true. The facts have been agreed by the parties. The defendant's attorneys received notice on December 24, 1896, that the exceptions had been disallowed by the presiding justice of the Superior Court. On January 12, 1897, through an attorney at law, they presented the petition to establish the truth of the exceptions at the office of the clerk of courts at Taunton, in said county of Bristol. The office was in charge of Miss Wood, the clerk of the courts for that county being at that time in Florida, and the assistant clerk being in attendance upon the Superior Court then sitting at Fall River. Miss Wood received the petition, and indorsed on it the following: "Bristol ss. Sup. Jud. Court. Filed and entered Jan. 12, 1897. Simeon Borden, Clerk." No entry fee was paid or demanded. On the evening of January 13 the assistant clerk returned to Taunton, and Miss Wood called his attention to the petition, and on the morning of the 14th he wrote to the defendant's attorneys that the petition "was not filed or entered upon the docket of the Supreme Judicial Court for the reason that no entry fee was paid." On the same day the attorneys of the defendant replied, enclosing the entry fee, and saying, "We regret that our representative was not asked to pay it, as he would have done, if he had understood that it was required." On January 15, the assistant clerk wrote them acknowledging the receipt of the entry fee, and saying, "I shall make this entry on the docket of the Supreme Judicial Court: 'Petition received Jan. 12, 1897. Entry fee received Jan. 15, 1897. Filed and entered Jan. 15, 1897.'" The defendant's attorneys protested against this change. The affidavit of the attorney at law who presented the petition states that he fully explained to Miss Wood that he wished her to file and enter the petition immediately; that she replied that she understood what was wanted, and would file and enter the petition

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immediately. And that he was ready and willing to pay all fees, but he was not aware that an entry fee was required. It is to be inferred that Miss Wood did not know, or, if she knew, did not remember, that an entry fee was required.

The statutory provisions which concern the establishing of the truth of exceptions which have been disallowed are found in Pub. Sts. c. 153, § 13, and the rule made by this court pursuant to said section is Common Law Rule XXX., 136 Mass. 598. The rule requires a party to file his petition within twenty days after notice of the refusal of the justice to sign and allow the bill of exceptions "in the court in which the exceptions would by law have been entered, if duly signed and allowed," etc. January 12, 1897, was the nineteenth day after notice of such refusal, and January 14 was the twenty-first day after such notice.

The contention of the plaintiff is, that this petition is within St. 1891, c. 87, § 1; that an entry fee of three dollars was payable, and that the provision that "no suit, action, libel for divorce, or petition shall be entered or filed by the clerk until said fee is paid," is a condition precedent to the right to file such a petition, and that there could be no legal filing until such entry fee had been paid. The contention of the defendant is, that this statute does not relate to petitions filed in the full court of the Supreme Judicial Court, or that, if it does, the provision we have cited is only directory to the clerks, and was not intended to affect the rights of parties when a petition had been actually filed, particularly when an entry fee was not paid because it was not demanded, and it did not occur to any one present at the time of filing that an entry fee was payable.

It is not entirely clear that petitions to the full court were intended to be included in the statute. Certainly nearly all the proceedings mentioned in the statute are proceedings over which the full court has no original jurisdiction. In the present case, however, as the original action was in the Superior Court, this petition was the first proceeding of any kind relating to it which was within the jurisdiction of the Supreme Judicial Court, and following the analogy of the decision in *Burlingame* v. *Bartlett*, 161 Mass. 593, we are inclined to hold that on the filing of the petition in the Supreme Judicial Court for the county of Bristol the sum of three dollars was payable under St. 1891, c. 87, § 1.

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The Supreme Judicial Court sitting in banc for the county of Bristol is not the Supreme Judicial Court for the Commonwealth, in regard to which there are special provisions of statute.

St. 1888, c. 257, established annual salaries for the clerks of courts for the counties named in the statute, and provided that the clerks of the courts in the several counties should account to the treasurer of the county for all fees and moneys of whatever description or character received by them or by any assistant or other person in their offices and employment for any acts done or services rendered in connection with their offices; and by the eighth section it was provided that "the clerks of the courts shall collect all fees in advance." This statute provided that the annual salaries established for the clerks of the courts in the counties mentioned should be in full compensation for all official services. See Pub. Sts. c. 159, §§ 28–30. St. 1887, c. 112, had made provision for an annual salary of the clerk of the courts for the county of Dukes County, and this statute with the St. 1888, c. 257, established annual salaries for the clerks of courts in all the counties of the Commonwealth.

The provision in St. 1888, c. 257, § 8, that "the clerks of the courts shall collect all fees in advance," probably was inserted for the purpose of holding them accountable for all fees which were by law payable, whether they actually collected them or not; and it also served as a protection to the clerks against the importunity of lawyers or parties who desired that credit might be given them for the payment of fees. But the provision, we think, could not properly be construed as a condition precedent to the rights of parties under processes which in fact had been duly entered in the courts without the payment of the proper fees in advance. It would require very explicit provisions of statute to induce us to hold that a party must determine, at the peril of losing all benefit from the entry of any writ, petition, or other process, when an entry fee is payable and how much is payable, and must make the payment in advance, although an entry fee is not demanded by the clerk, and the writ, petition, or other process has been actually entered in court. The provision in St. 1891, c. 87, § 1, that "no suit, action, libel for divorce, or petition shall be entered or filed by the clerk until said fee is paid," undoubtedly is in form more nearly mandatory than the provision

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in St. 1888, c. 257, § 8, that "the clerks of the courts shall collect all fees in advance," but we are of opinion that this also was intended to be directory to the clerks. The effect of filing with the proper officer, at the proper place, papers required to be filed ought not to be affected by the question whether the proper legal fees have or have not been paid, if the fees are paid which are demanded. The mistake, if any has been made, can be corrected afterwards. We are of opinion that, under the circumstances shown in this case, the petition was properly filed within the meaning of Common Law Rule XXX. when it was received at the proper office by Miss Wood and indorsed by her as filed and entered on January 12, 1897. *Reed* v. *Acton*, 120 Mass. 130. As no other objection is made to the petition, the motion to dismiss must be overruled, and a commissioner to hear the parties upon the allegations of the petition, and to make report to the full court, must be appointed. *So ordered.*

E. W. Burdett & C. A. Snow, for the defendant.

S. H. Tyng, for the plaintiff.

EDWARD P. KELLEY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 11, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Husband and Wife — Consequential Damages from Injury — Loss of Consortium — Action.

A husband may maintain an action against a railroad corporation for consequential damages, including the loss of consortium with his wife, arising from personal injuries occasioned to her by its negligence, although an action has been brought by her against the corporation for such injuries.

TORT, to recover consequential damages arising from personal injuries to the plaintiff's wife, Mary J. Kelley, occasioned by the defendant's negligence. Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

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This action was tried at the same time with an action brought by the plaintiff's wife to recover for injuries which she herself had suffered.

There was evidence tending to show that on October 23, 1894, the plaintiff's wife, while a passenger on a train of the defendant, was injured; and the defendant admitted that her injuries were caused by the negligence of its servants, and that she was at the time in the exercise of due care.

There was also evidence tending to show that the plaintiff's wife, prior to the accident, had been in good health, and had done the housework, cooking, and washing in the plaintiff's household, and had taken the entire care of two children; that in the accident referred to she had suffered a fractured shoulder blade, an injury to her womb causing a retroversion and pain for some time, and numerous severe bruises; that after the injury she had returned to the plaintiff's home, and for five or six weeks had had one arm bandaged, and had been unable for a considerable length of time to do any work about the plaintiff's house, and because of her injuries had been compelled to wean her child, which she was then nursing; that her capacity to work was permanently impaired, and she had been made irritable, pallid, thin, and weak; and that since the accident she had continued to live with the plaintiff, and on October 21, 1895, had borne him a child; and there was no evidence, other than reasonable inferences from the foregoing facts, that any change had occurred in their relations toward one another as husband and wife. There was further evidence that the plaintiff had incurred expenses for medical attendance, nursing, and medicine for his wife, to the amount of over $1,000.

At the close of the evidence, the defendant requested the judge to rule as follows:

"1. Upon all the evidence the plaintiff cannot recover.

"2. The division of the rights to recover, which by law are made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and the damages which are to be divided between the husband and the wife should not in the aggregate exceed the damages which the wife, if unmarried, would be entitled to recover."

The judge declined to give the first ruling requested, but gave

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the second, with the qualification that one additional element should be considered, namely, the loss of consortium by the husband; and the defendant excepted.

The judge also instructed the jury that, although the wife's time and capacity to earn were her own, yet there was a residuum to which the husband was entitled which could best be defined by the word consortium, meaning fellowship, society, or communion, for the loss of which he alone was entitled to recover; and the defendant excepted.

The jury returned a verdict for the plaintiff in the sum of $616; and the defendant alleged exceptions.

J. H. Benton, Jr., & C. F. Choate, Jr., for the defendant.

J. E. Cotter, for the plaintiff.

ALLEN, J. In *Bigaouette* v. *Paulet*, 134 Mass. 123, a husband's action for loss of consortium with his wife was held to be maintainable, although there was no loss of service or payment of expenses in consequence thereof. And in *Bennett* v. *Bennett*, 116 N. Y. 584, it is said that the basis of the husband's action for loss of consortium is his right to the conjugal society of his wife, and that it is not necessary that there should be proof of any pecuniary loss or loss of service.

The present case was tried with an action brought by the plaintiff's wife, and the same jury fixed the damages in both cases. The defendant took exceptions in this case, but none in the action brought by her. The jury were instructed that the division of the rights to recover, which by law are made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and that the damages which are to be divided between the husband and the wife should not in the aggregate exceed the damages which the wife, if unmarried, would be entitled to recover; with the qualification, however, that one additional element should be considered, namely, the loss of consortium by the husband. The defendant contends that now an action will not lie for loss of consortium, or at least that it will not in case of an injury to her through negligence, and that the incurring of expenses will not alone give a ground of action.

It might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appear to have exceeded the amount of the ver-

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dict, and that therefore the defendant's exceptions should be overruled; but in view of the ruling at the trial allowing the jury to take into account the plaintiff's loss of consortium, and of the defendant's request that the correctness of this ruling should be determined, we proceed to consider it.

By the common law it is quite clear that a husband might maintain an action in his own name alone for an injury to his wife which resulted in his loss of consortium with her; as, for example, for an injury caused by an assault and battery upon her, by medical or surgical malpractice, or by other negligence. *Hyde* v. *Scyssor*, Cro. Jac. 538. *Guy* v. *Lusy*, 2 Rol. R. 51. *Russell* v. *Corne*, 2 Ld. Raym. 1031. *Dix* v. *Brookes*, 1 Stra. 61. *Smith* v. *Hixon*, 2 Stra. 977. 2 Rol. Abr. Trespass, (Y) 16, p. 556. Hale's Anal. of Law, 96. 3 Bl. Com. 140. 1 Chit. Pl. (7th ed.) 83. Yelv. (Met. ed.) 89. *Baker* v. *Bolton*, 1 Camp. 493. *Carey* v. *Berkshire Railroad*, 1 Cush. 475, 478. *Barnes* v. *Hurd*, 11 Mass. 59. *Laughlin* v. *Eaton*, 54 Maine, 156. *Hopkins* v. *Atlantic & St. Lawrence Railroad*, 36 N. H. 9, 14. *Lewis* v. *Babcock*, 18 Johns. 443. *Matteson* v. *New York Central Railroad*, 35 N. Y. 487. *Jones* v. *Utica & Black River Railroad*, 40 Hun, 349 (a case much like the present). *Berger* v. *Jacobs*, 21 Mich. 215. *Hyatt* v. *Adams*, 16 Mich. 180. *Long* v. *Morrison*, 14 Ind. 595. *Nixon* v. *Ludlam*, 50 Ill. App. 273. *Mewhirter* v. *Hatten*, 42 Iowa, 288. *Mowry* v. *Chaney*, 43 Iowa, 609. *Smith* v. *St. Joseph*, 55 Mo. 456.

The contention of the defendant, therefore, must rest entirely on the ground that the husband has lost this right of consortium by reason of the legislation of this Commonwealth increasing the rights of married women. *Harmon* v. *Old Colony Railroad*, 165 Mass. 100. But there has been no substantial change in the statutes upon this subject since the decision in *Bigaouette* v. *Paulet*. Notwithstanding the progress of legislation in giving to married women the control of their time and actions, this right of the husband is not destroyed. The unity and identity of interest which by the common law existed between husband and wife have been impaired. *Butler* v. *Ives*, 139 Mass. 202. They are not, however, entirely done away with. The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance, which is different in charac-

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ter and degree from that which other people have, or which she is at liberty to give to them. By marriage, both husband and wife take upon themselves certain duties and obligations towards each other, in sickness and health, which it cannot be supposed that the Legislature has intended wholly to uproot. A married woman may now perform any labor or services on her sole and separate account, as her husband may; nevertheless, each owes certain duties to the other which are not annulled by the statutes. *Mewhirter* v. *Hatten*, 42 Iowa, 288. These duties are included in the word consortium; but the extent of these duties, or of the right of consortium, need not now be determined. The only question presented to us is, whether the presiding justice was right in allowing the jury to consider at all the loss of consortium.

It is argued by the defendant, that, if a husband has a right to recover for the loss of consortium through an injury caused by negligence, a wife also would have the same right, by virtue of the existing statutes, in case of such an injury to her husband; and that this has never been held or even contended for. She has no such right at common law; but whether she has by statute we do not now consider. The question has been considered elsewhere, but the decisions are not in harmony.

Exceptions overruled.

JOSEPH C. McKAY *vs.* DAVID MYERS & another.

Suffolk. March 11, 1897. — May 19, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Contract — Evidence — Action — Accord and Satisfaction.

In an action to recover the proceeds of sales of goods, the plaintiff testified that he wrote a letter to the defendant and took a press copy of it himself, and also testified to a general course of business in conducting his correspondence which tended to show that he deposited the letter in the post office properly directed to the defendant; and, on cross-examination, he testified that he would not say, as a matter of memory, that he deposited this particular letter, but that he remembered writing and copying it, and that he did it in the general course of his business and in accordance with his usual custom, in pursuance of which he would naturally deposit the letter in the post office, properly directed and post-

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paid, soon after writing it. The defendant failed to produce the original letter upon notice; but a subsequent letter from the defendant to the plaintiff, put in evidence, contained indications that a letter referred to in it was the letter in question. *Held*, that the press copy of the letter was rightly admitted in evidence.

At the trial of an action to recover the proceeds of sales of leather, a letter from the plaintiff to the defendant, put in evidence, stated that A. was under a contract to tan a large number of hides for the plaintiff, and to tan exclusively for him until the contract should be completed, and that the plaintiff owned the bark used in the business; and the plaintiff proposed in the letter to furnish information in regard to their relations, should there be occasion to do so. There was evidence that the plaintiff furnished A. money to pay the other expenses of conducting the business; that subsequently the defendant wrote to the plaintiff, proposing, with A.'s consent, to furnish a large number of hides to be tanned by A. on commission, the proceeds of the sale of the leather to be sent to the plaintiff; and that the plaintiff replied, assenting to the arrangement, and repeating in his letter the provision that the proceeds were to be sent to him. *Held*, that the evidence was sufficient to warrant the finding of a contract between the plaintiff and the defendant; and that the signing of an order by A., at the defendant's request, to pay the plaintiff the proceeds of sales of leather due from the defendant to A. did not deprive the plaintiff of his rights.

The acceptance of a check, enclosed in a letter which refers to the amount as the balance due on the account between the parties, is not a bar to an action upon the account if the plaintiff ascertains from a subsequent statement sent to him at his request that the defendant has credited himself in the account with items which could not be allowed to diminish the amount due the plaintiff, nor does a silence of eighteen months after receiving the account preclude him from recovery; and there is no accord and satisfaction, if there was no controversy between the parties when the check was accepted by the plaintiff, and no compromise, or knowledge on his part that there was anything to be compromised.

CONTRACT, upon an account annexed, to recover the proceeds of sales of leather. Writ dated April 11, 1895. Trial in the Superior Court, without a jury, before *Sheldon*, J., who found for the plaintiff; and the defendants alleged exceptions. The facts sufficiently appear in the opinion.

A. Hemenway & J. F. Simmons, for the defendants.

B. L. M. Tower, (*E. O. Hiler* with him,) for the plaintiff.

KNOWLTON, J. We may first consider the question whether the press copy of the plaintiff's letter of January 27, 1892, was rightly admitted in evidence, the defendants having failed to produce the original upon notice. The plaintiff testified that he wrote the letter and took the press copy himself, and also testified to a general course of business in conducting his correspondence which tended to show that he deposited this letter in the post office properly directed to the defendants. In cross-examination he testified that he would not say, as a matter of memory,

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that he deposited this particular letter, but, as we understand his testimony, he meant to state, not only that he remembered writing and copying the letter, but remembered that he did it in the general course of his business and in accordance with his usual custom, in pursuance of which he would naturally deposit the letter in the post office, properly directed and post-paid, soon after writing it. The defendants' letter of October 10, 1892, to the plaintiff, contains indications that the letter referred to in it is that of January 27, 1892, rather than that of January 24, although these are by no means conclusive. Of course, if the letter was properly mailed to the defendants, there was *prima facie* evidence that they received it. *Huntley* v. *Whittier*, 105 Mass. 391. *Briggs* v. *Hervey*, 130 Mass. 186. We are of opinion that there was evidence to warrant the admission of the letter.

The next question is whether there was evidence of a contractual relation between the plaintiff and the defendants in regard to the proceeds of the leather. Upon this point we may assume that the defendants had the information of the plaintiff's connection with the tanning business conducted by Williams, disclosed in his letter of January 27, 1892, in which it was stated that Williams was under a contract to tan a large number of hides for the plaintiff, and to tan exclusively for him until the contract should be completed, and that the plaintiff owned the bark used in the business. The plaintiff proposed in the letter to furnish further information in regard to their relations, should there be occasion to do so. There was evidence that he furnished Williams money to pay the other expenses of conducting the business. Under these circumstances the defendants, on October 10, 1892, wrote to the plaintiff, proposing, with Williams's consent, to furnish five thousand hides to be tanned by Williams on commission, the proceeds of the sale of the leather to be sent to the plaintiff. To this letter the plaintiff made reply assenting to the arrangement, repeating in his letter the provision that the proceeds were to be sent to him. The relations of the plaintiff to the business conducted by Williams furnished an ample consideration for such a contract between him and the defendants. These letters, in connection with other evidence, are sufficient to warrant the finding of a contract between them.

There is nothing in the case necessarily inconsistent with this

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finding. The signing of the order at the request of the defendants did not deprive the plaintiff of his rights. It may have been requested by the defendants as a precaution against possible claims by Williams.*

The defendants contend that the plaintiff's acceptance of the defendants' check for $355.06, enclosed in a letter dated September 23, 1893, which referred to the amount as the balance due on the account, is a bar to his recovery. At the time when the plaintiff accepted it, he had no reason to believe that the statement contained in the letter was not true. He had received no statement of the particulars of the account, and they were not within his knowledge. The subsequent statement, which was sent to him by letter, at his request, three weeks afterwards, showed that the defendants had credited themselves in the account with items for money paid Williams which could not be allowed to diminish the amount due the plaintiff. There was no accord and satisfaction. There was no controversy between the parties when the check was accepted by the plaintiff, and no compromise, or knowledge on the part of the plaintiff that there was anything to be compromised. If the check had been accepted as a settlement and compromise of a matter in dispute, the settlement would have been binding as an accord and satisfaction. *Riggs* v. *Hawley*, 116 Mass. 596. The account subsequently sent by the defendants to the plaintiff, and the plaintiff's long silence in regard to it, did not preclude him from recovering the amount shown to have been credited to the defendants without authority. *Harriman* v. *Harriman*, 12 Gray, 341. *Dunbar* v. *Johnson*, 108 Mass. 519. *Grinnell* v. *Spink*, 128 Mass. 25. *Wiggins* v. *Burkham*, 10 Wall. 129.

Exceptions overruled.

* The order, which was addressed to the defendants and signed by Williams, was as follows: "Please pay to McKay & Co., of Boston, Mass., or order, amount of proceeds of sales of leather made from hides furnished by your firm to me since October 10th, 1892, after having deducted your charges against same."

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FRANK W. ELLIS *vs.* SARAH SIMONDS.

Middlesex. November 18, 1896. — May 20, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Malicious Prosecution — Want of Probable Cause — Malice.

At the trial of an action for the malicious prosecution of the plaintiff on a criminal charge, the judge, in effect, instructed the jury that, if they found that the defendant in instituting the prosecution acted with the care and prudence which would have been exercised by a reasonable and ordinarily prudent person under like circumstances, they should then find that there was probable cause, and the defendant would not be liable. *Held*, that the defendant had no ground of exception.

At the trial of an action for the malicious prosecution of the plaintiff on a criminal charge, the judge instructed the jury that malice might be inferred from the want of probable cause, and told them what would and what would not constitute malice and probable cause, but did not instruct them that want of probable cause could not be inferred from malice. *Held*, that it was to be presumed that the jury followed the instructions given, instead of drawing inferences about which nothing had been said, and that the defendant had no ground of exception.

At the trial of an action for malicious prosecution, the defendant has no ground of exception to remarks of the judge to the jury by way of illustration or definition of probable cause and malice, where he expressly cautions them that it is for them to say how the questions which he suggests are to be answered, and that they are not to infer, from the manner in which the questions are stated, that one answer or another is to be given.

TORT, for malicious prosecution. Writ dated January 8, 1894. Trial in the Superior Court, before *Bishop*, J., who allowed the following bill of exceptions.

The plaintiff, on December 30, 1893, on complaint of the defendant, was arrested on the charge of obtaining money from the defendant by false pretences, taken to Malden, and, until bail was procured by him, was committed to jail. Subsequently, on a trial of the charge on January 8, 1894, the plaintiff was acquitted. The plaintiff testified that in 1893 he lived in Marlborough, in the upper tenement of an apartment house; that his sister in law, Mrs. Howe, occupied the lower tenement of the same house; that he first met the defendant in May, 1893, in Marlborough, whither she had gone to see the plaintiff's mother in law, who was ill, and who was living with her daughter, Mrs. Howe;

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that the defendant came on one day, and went away the next; that during her visit she remained with Mrs. Howe, except that on the day after her arrival she went up stairs to the plaintiff's apartment and remained there for about an hour conversing with the plaintiff and his wife; that the next time the plaintiff saw the defendant was on September 20, 1893, at the same place, when she went there to attend the funeral of the mother of the plaintiff's wife; that the plaintiff was in the defendant's company at that time, and conversed with her in a general way both in his and Mrs. Howe's house; and that he next saw her in court at Malden.

The plaintiff further testified that he was arrested in Marlborough on Saturday, December 30, 1893, and taken to the police station; that on the following Monday he went to Malden to attend court; that after his arraignment, in default of bail, he was committed to jail in Cambridge; that he was handcuffed to three other men and with them was taken to the police station in Malden and subsequently to the jail in Cambridge, where he remained until bail was procured in the afternoon of the following day; that while so handcuffed he was taken through the streets of Cambridge, meeting on the way a person from Marlborough with whom he had long been acquainted; that on January 8, 1894, he was placed on trial; that at such trial the defendant testified that she swore out the complaint; that, according to the recollection of the plaintiff, the defendant testified that he went to her house in Malden on July 6, 1893, soliciting life insurance, and persuaded her to pay him ten dollars on account of a policy for which he gave her a receipt; that on direct examination she testified that she knew the plaintiff, and on cross-examination that she did not; that when asked why she did not make herself known to the plaintiff, she said she had a reason for it which she did not disclose; that she testified at the trial that the plaintiff, after July 6, was there with clothes-wringers, at which time she said she seemed to recognize the plaintiff and that she treated him to beer; that she then testified that when she was at the funeral in Marlborough the plaintiff turned his face from her and would not look at her, and at the railroad station in Marlborough he stood on the platform and laughed at her as the

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train went out. The plaintiff further testified that he was not in Malden on July 6, 1893, and never received any money from the defendant; that he never went to her house as an insurance agent or representing himself as such, nor had he ever been employed by any insurance company to solicit insurance; that he did not go to the defendant's house selling clothes wringers, and that he did not turn his face away from her at the funeral or attempt to conceal himself from her. He also testified as to the injury caused to his reputation and business.

The wife of the plaintiff testified that the defendant was her cousin; that they first met in May, 1893, when the defendant came to Mrs. Howe's house and stopped there over night; that on the day after her arrival she came up stairs to the apartments of the witness, and remained for an hour or more with the witness and her husband, who was there all the time, and that the conversation was general between the plaintiff, the defendant, and the witness; that the next time the witness saw the defendant was in the following September at the funeral; that the defendant came to Mrs. Howe's the night before the funeral, but the witness could not say whether the defendant saw the plaintiff then, because he had a headache and retired early; that on the following morning the defendant came into the witness's house where the plaintiff was; that she was not certain that they conversed together, but thought they did; that they were together and spoke when in Mrs. Howe's house; that the witness went to Westminster after the funeral, and the defendant shook hands with her and the plaintiff at the depot at parting; that the witness conversed extensively with her at the house in a general way, although they were never alone together; and that at no time did the defendant say anything to the witness as to any misconduct of her husband, but that there was no lack of opportunity for the defendant to ask the witness to go aside and talk with her alone.

There was also evidence that, at the trial of the complaint against the plaintiff, the defendant testified that in July, 1893, a man came to her house and wanted her to take out a policy of insurance in some disability company; that she gave him ten dollars, for which, in two weeks, she was to receive a policy;

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that the man gave her a receipt with the name C. M. Clark, and that that man was the plaintiff; that on cross-examination she testified that she knew at the time she paid him the money who he was; that he subsequently came and tried to sell her a clothes-wringer, and after that she knew who he was; and that she halloed to him and he ran away. There was also evidence that, at the time the complaint was issued, the defendant stated to the chief of the Malden police that she was positive that she knew the man who swindled her, and when he asked her how she knew it, she said that he was married to a relative of hers who lived in Marlborough, and that she last saw him there at the funeral of a relative, and had never seen him before; and that she said he was not much of a man, and his wife's sister wanted to get rid of him.

The defendant testified that a man came to her house in July, and desired her to take a policy of insurance; that he talked so smooth and long that she finally gave him ten dollars; that he then gave her a receipt and departed, saying he would be around again in a short time; that on his failure to return she went to the chief of police and showed him the receipt and he said it was worthless, and that several detectives were after a man of that character; that the defendant had a faint recollection of having seen the man before, but could not then place him; that on the day before the funeral she went to Marlborough, but did not see the plaintiff, whose wife said that he had a headache and could not come down; that on the day of the funeral she saw him and said, "Mr. Ellis, how is your head?" and that he turned his face away from her and replied, "Better"; that at that time the plaintiff was very busy, and had no time to talk to anybody, and that the defendant did not see him again until she was at the railroad station, and the plaintiff stood on the platform looking toward her and laughing; that when the plaintiff replied to her question the defendant recognized him by his features, his form, his general appearance, his strange conduct, and his refusal to look at or speak to her, or to go into the room where she could talk with him; that after her visit to Marlborough she told the Malden chief of police that she was quite sure she had recognized the man, after which she had him arrested; that she made the complaint because she felt it to be a duty; and that

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she had no malicious feeling towards him. On cross-examination the defendant testified that it was in the forenoon of July 6 that the man came to her house to talk about insurance; that they were in the same room talking together, and that she had good opportunity to see him; that he may have been in the house half an hour, during which time he did not remove his hat; that after he had left the house it occurred to her that he resembled somebody she had seen before, and that at the funeral it first occurred to her that this man resembled the plaintiff; but that she did not endeavor to hold any conversation with the plaintiff or his wife at the time of the funeral nor seek any opportunity to do so, because the arrangements for the funeral made it impracticable. The defendant also denied that she had said that Ellis was a worthless fellow, and that Mrs. Howe wanted to get rid of him.

This was all the material evidence in the case.

The judge instructed the jury in substance as follows. In order to maintain this action, it is essential for the plaintiff to prove three propositions, viz.: first, that he was acquitted or discharged in the criminal prosecution instituted by the defendant; secondly, that there was a want of probable cause on the part of the defendant in instituting such proceeding; and, thirdly, that in instituting it she was actuated by malice. The first proposition has been proved and admitted by the defendant. In determining the second proposition, you are to inquire whether, if the defendant had acted like an ordinarily prudent person, she would have instituted this proceeding against the plaintiff, or, considering the events as of the time when they occurred, was there such an absence of a justifiable cause for the institution of such a prosecution that a reasonable and prudent person would have refrained from instituting it? Now what were the facts, if any, which justified her conduct? Did she or did she not act with ordinary care, prudence, and caution in such an important matter as making an accusation which would cause the arrest, confinement, and trial of the man against whom it was made? If she did, she is not liable. But if an ordinarily prudent person would have bethought himself and have said, Perhaps I may be mistaken; I saw Ellis only once before this transaction, and once after it at the funeral, and I have seen the man

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who swindled me but once, and though I think Ellis is that man and my suspicions are aroused, yet I am not certain, and since Mrs. Ellis is a relative of mine and I know nothing else against him and there are people in Marlborough of whom I can make inquiries, I will go and have a talk with Ellis and his wife and see what all this means; or, if there is no opportunity at the funeral, I will later go to Marlborough again to make inquiries before I swear out a complaint that he is the man who swindled me; — then in omitting so to do before swearing to the complaint the defendant failed in her duty. It is for you to say which of these two things is true; if you find that she acted prudently, she is not liable; if you find that she did not so act, then it is for you to consider whether her conduct was actuated by malice. Malice may be inferred from a want of probable cause, but such an inference does not follow of necessity, and it may be inferred from all the circumstances of the case, since it is seldom that direct evidence of malice is produced. Now, testing this proposition by the circumstances of the case, would a fair minded person under such conditions have failed to make inquiries and verify her suspicions? This inquiry is applicable to this as well as to the previous proposition. There is evidence that the defendant stated to the chief of police in Malden that the plaintiff was married to a relative of hers; that he was not much of a man, and that his wife's sister wanted to get rid of him. I do not refer to this evidence for the purpose of leading you out of the line of legitimate evidence; but, although you are not by suspicion to infer a motive or result from something which does not appear, you have a right to draw such inferences as you may think are justified by the evidence and the facts. Now, on the evidence, was the defendant in a malicious frame of mind toward the plaintiff, so that she did not exercise that caution and care which, had she not been actuated by that motive, she would have exercised?

The defendant requested the judge to rule as follows:

"1. The question of probable cause must be decided by the circumstances existing at the time of the arrest, and not by the turn of subsequent events.

"If the defendant had at that time such grounds for supposing the plaintiff guilty of the crime charged as would satisfy

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a cautious person, then she violated no duty to the plaintiff in procuring his arrest, though such grounds be immediately and satisfactorily explained away or the truth discovered by the prosecutor herself, and if the jury find that the defendant had such ground at that time then their verdict must be for the defendant.

"2. A person who has been arrested for an offence and who is really innocent may have suffered great damage by reason of his arrest, and may have expended large sums of money to show his innocence and procure an acquittal.

"But the mere facts of his innocence and the injury which was caused him by his arrest do not entitle him to recover for the injury from the person who caused the arrest. If it were so, then every person arrested and acquitted would be entitled to recover damages for the injury.

"It is only when the arrest was made without probable cause and maliciously that a right of action is given to him.

"3. The burden of proof is upon the plaintiff to show that his arrest was without probable cause. This means that the plaintiff must establish to the satisfaction of the jury that when the defendant caused his arrest she did not honestly believe that he was the guilty person. It was not sufficient that the plaintiff should show that he was not the person who committed the offence, but he must also show in addition that the defendant did not believe him to be that person, or that as a cautious person she ought not to have believed it. The absence of this belief must be proved by the plaintiff.

"As matter of law, there is no evidence to show that the defendant did not believe the plaintiff Ellis to be the person who committed the offence for which he was arrested, and that issue must be decided in favor of the defendant.

"4. It was not necessary that before she caused the plaintiff's arrest the defendant should have been satisfied beyond any doubt that the plaintiff was the person who committed the offence.

"If, as a person of ordinary intelligence and caution, she was reasonably satisfied that he was the man, then the arrest was justified and the verdict should be for the defendant.

"5. The question in a case of this kind is not 'Was the party charged in fact guilty?' but 'Had the prosecutor, acting as a cautious and prudent person, reasonable ground to believe that

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he was guilty?' And the fact of the subsequent acquittal of the accused does not affect in any manner the question whether the plaintiff in the former case, who is defendant here, acted without probable cause.

"The question whether there was probable cause for the institution of the case by this defendant before the court at Malden must be divided into two parts: first, was there probable cause to believe that the offence was committed; secondly, was there probable cause to believe that the accused was the party who committed that offence.

"Probable cause does not depend upon the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution.

"There is no question on the first of these propositions, that there was such probable cause. As to the second, if the defendant at the time she instituted the prosecution against Ellis honestly and reasonably believed that he was the person who had committed the offence, then she cannot be held in damages because it turned out at the trial or afterwards that she was mistaken in the man.

"She could not act hastily, wantonly, or without caution in arriving at this conclusion; but if, acting as a prudent and cautious person, she honestly believed that he was the man and acting upon that belief caused his arrest, then she is not guilty of a malicious prosecution, and the verdict should be in her favor.

"It would be a dangerous principle if a person who institutes criminal proceedings against another, acting honestly and in good faith upon well grounded suspicion that such other person had committed an offence, should afterwards, when it turns out that the accused was in fact innocent, be liable for an action for malicious prosecution. Such a rule would greatly embarrass our criminal procedure, and is therefore not recognized by the law. Therefore, the rule is that an action of malicious prosecution will not lie against the prosecutor if he or she proceeded upon an honest belief that the person accused is the guilty person.

"6. There is no question that a fraud was really perpetrated on the defendant by some person in procuring from her money on the pretence of insurance for disability, and that she was fully

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justified to make or lodge a criminal complaint, and cause the arrest of the perpetrator of the crime.

"The question is now whether she had probable cause to believe that this plaintiff, Ellis, was the person who perpetrated that fraud upon her.

"Upon that point, if the defendant, acting as a cautious and prudent person, honestly believed from the plaintiff's appearance and actions that he was the person, or if she identified him as such in the honest belief that he was the person, then there was probable cause for her prosecution, though it turned out afterwards that she was mistaken in his identity.

"7. The law as applicable to a case of malicious prosecution is, that if a person makes a charge for an offence actually committed, and identifies another person as the perpetrator thereof, the question is not whether the identification was correct, but whether the accuser as a cautious person honestly believed that the party charged was the guilty party, and it matters not whether he in fact was the real party or not. Cases of mistaken identity may honestly occur, and so long as the defendant in identifying the plaintiff acted as a cautious person, in good faith, she is not to be charged with a malicious prosecution.

"8. The acquittal of the accused on his trial is not any evidence of the want of probable cause, and the jury has not the right from the fact of acquittal alone to assume that the prosecution was without probable cause.

"9. The want of probable cause does not raise a legal presumption of malice.

"It may be inferred therefrom, as it may be inferred from other circumstances. But by whatever mode it may be proved, it must be proved as a fact.

"10. If the jury believe from the evidence that the defendant, acting as a cautious person, honestly believed the plaintiff to have been the person who committed the offence, and acting upon such honest belief she caused his arrest, then the jury must find for the defendant, even if malice has been shown to have existed.

"11. The jury must pass on the question of malice as a distinct matter; there is no such thing as implied malice in an action of this kind.

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"A wrongful charge even made without probable cause is not of itself malicious in fact.

"It must be affirmatively shown by the plaintiff that she, the defendant, was actuated in her conduct by malice or some improper or sinister motive.

"12. It has been said that malice may be inferred from the want of probable cause. This does not mean that, because the jury believe that the defendant had no probable cause in her prosecution against the plaintiff, therefore they must infer that the prosecution was malicious.

"The want of probable cause itself does not prove conclusively that the prosecution was malicious; all that is meant when we say that the jury may infer malice from the want of probable cause is, that, when a person accuses another wrongfully and without probable cause, the jury might infer that such prosecution was malicious because no other ground for it is reasonably apparent. But, on the other hand, the jury may well believe that though a person wrongfully and without probable cause accuses another of crime, the prosecution may still be free from malice and actuated by honest motives.

"Therefore, even if the jury believe that the prosecution of the plaintiff was without probable cause, but the jury do not believe from the evidence it was instituted or carried on with malice, the verdict must be for the defendant."

The judge declined to give such rulings in the form requested; and to such refusal, and to so much of the charge as referred to the degree of prudence required to establish probable cause, and to so much thereof as referred to the elements of malice, the defendant excepted.

The jury returned a verdict for the plaintiff.

J. M. Lesser, (*G. H. Fall* with him,) for the defendant.

J. W. McDonald, for the plaintiff.

MORTON, J. The plaintiff was bound to establish three things: first, that he had been acquitted of the charge; secondly, want of probable cause on the part of the defendant; and thirdly, malice on the part of the defendant. *Stone* v. *Crocker*, 24 Pick. 81. *Bacon* v. *Towne*, 4 Cush. 217. *Good* v. *French*, 115 Mass. 201. *Lister* v. *Perryman*, L. R. 4 H. L. 521. These were to be shown affirmatively by him, as the court

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instructed the jury. As there was no real controversy about the fact of acquittal, the main issues related to probable cause and to malice.

In regard to probable cause the court, in effect, instructed the jury that if the defendant acted in instituting the prosecution with such care and prudence as a reasonable and ordinarily prudent person would have acted under the circumstances, then they should find that there was probable cause, and that that would end the case. We think that this was correct. If the prosecutor acts as a reasonable and discreet person would have acted under the circumstances, then it must follow that there is probable cause for the prosecution, or, in other words, ground for a strong suspicion of, or an honest belief in, the guilt of the accused. If there was probable cause, then, even though the prosecution was malicious, the court was right in saying that the defendant was entitled to a verdict. *Stone* v. *Crocker*, *ubi supra*.

In regard to the question of malice, while the court instructed the jury that malice might be inferred from want of probable cause, it did not instruct them that want of probable cause could not be inferred from malice. But the jury were told what would constitute malice and what would constitute probable cause, and what not, and it is to be presumed that they followed the instructions thus given, instead of drawing inferences about which nothing had been said. We do not understand the instructions to mean that malice was to be inferred from a want of care and caution, but that the jury might consider whether the failure to make such inquiries, as a reasonably prudent person might have made, was or was not due to a malicious purpose on the part of the defendant. This they properly were allowed to do.

The defendant presented numerous requests for instructions, twelve in all. None of them were given in the form requested, and the court was not obliged to give them in that form if it gave them in substance, so far as applicable to the questions at issue. *Hudson* v. *Marlborough*, 154 Mass. 218. *Norwood* v. *Somerville*, 159 Mass. 105. Without considering the requests in detail, we deem it enough to say that we think that the instructions which were given were sufficient. We do not think that the jury could have been biased or misled by anything which was said

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by the judge by way of illustrating or defining what was or was not probable cause or malice. He expressly told them that it was for them to say how the questions which he suggested should be answered, and that they were not to infer from the manner in which the questions had been stated that one answer or another was to be given. *Exceptions overruled.*

HEBER BISHOP *vs.* JOURNAL NEWSPAPER COMPANY.

Suffolk. November 18, 19, 1896. — May 20, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Libel — Damages — Law and Fact — Instructions.

An article in a city newspaper contained a picture of B., a practising physician, together with a sensational title and head lines, and the statement, copied from a newspaper published in another city, that B., one of the organizers of a certain social club, "had also succumbed to the enticing charms of Caterer C.'s pretty wife, and that, as a result, Mrs. B. was about to bring proceedings for a divorce, in which she would name the pretty Mrs. C. as co-respondent." This was followed by an account of separate interviews with B. and his wife, in which each denied the truth of the story, and concluded with a tribute to B.'s professional and social standing in the community. *Held*, in an action by B. against the publisher of the newspaper, that the article was libellous.

The fact that a libel may not be believed does not excuse the person who publishes it, nor deprive the plaintiff, in an action for its publication, of all except nominal damages; but it is for the jury to determine the damages.

Whether the natural consequences of the publication of a libel are of a character to entitle the plaintiff, in an action therefor, to substantial damages or only to nominal damages, is for the jury to decide.

The defendant in an action for libel is not entitled to a ruling that, "if the jury find that the article taken as a whole injured the plaintiff in his feelings and character, but find that the injury was slight, they may award nominal damages; and if they find that the defendant has only just overstepped the line, and that the action should not have been brought, then the damages must be nominal."

At the trial of an action by B., a physician, for libel, the judge instructed the jury upon the question of damages, among other things, as follows: "Now I think this is a good case to submit to twelve men in Suffolk County, to say what damages a plaintiff shall have who has been treated as Dr. B. has. Has he been injured, or has the defendant pursued a proper and justifiable course in which to treat a citizen who is a man of good character, and where the defendant does not set up the truth? . . . You are to take into consideration that the defendant had published what was published in N. Y., that the article was not true, so that when the defendant published this article it had not only the fact that

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Mrs. B., but that Dr. B. also, denied that there was any truth in that accusation. But still the defendant published it with their denial." *Held*, that the instructions did not tend unduly to bias and influence the jury.

TORT, for publishing "a false and malicious libel of and concerning the plaintiff," consisting of an article in the Boston Journal, published by the defendant on February 12, 1894, which contained a picture of the plaintiff, and was entitled "All by the Ears," and had the following head-lines: "Pretty Mrs. Howe upsets Megantic Club, — Dr. Heber Bishop indignant at what he hears in New York." The article began as follows: "There is a good-sized earthquake on in the Megantic Fish and Game Club. The first volcanic outburst occurred in New York on Saturday while Dr. Heber Bishop, of Boston, the president of the club in '93, was calling upon his friend and fellow clubman, Mr. Frederick L. Gilbert, at the latter's home in West Thirty-Fourth Street. And this was the cause of it all, as the story comes from Manhattan."

The article then stated that, while the plaintiff was breakfasting with Gilbert, the latter entertained him with an account of an action brought by the club's caterer, one Howe, against their mutual friend, one Woodruff, a former president of the club, for alienation of the affections of Mrs. Howe.

Then followed this statement: "The doctor, being well acquainted with all the parties to the suit, was very much interested in the discussion, and the morning papers were sent for. Dr. Bishop had not read very far when he dropped the paper with a gasp. Staring him in the face in cold type was a statement to the effect that 'Dr. Heber Bishop, one of the organizers of the club, had also succumbed to the enticing charms of caterer Howe's pretty wife, and that, as a result, Mrs. Bishop was about to bring proceedings for a divorce, in which she would name the pretty Mrs. Howe as co-respondent.'"

This was followed by an account of a long interview of a reporter of a New York newspaper with the plaintiff, in which the latter branded the story printed about him as "absolutely and unqualifiedly false"; and then came an account of another interview by a reporter of the defendant's paper with the plaintiff's wife, in which she also denounced the story as "perfectly absurd" and "positively untrue."

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The article concluded as follows: "Dr. Heber Bishop is one of the best known young physicians of Boston, and has a delightful home on Newbury Street, with an accomplished wife and at least two very pretty little daughters. He is of the firm of Bishop and Robinson, agents for the United States Mutual Accident Association of New York, of which he is also the surgeon. He stands high in Boston social circles, and was one of the original organizers of the Megantic Fish and Game Club."

Answer, a general denial.

Trial in the Superior Court, before *Sherman*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified in his own behalf.

The defendant admitted the publication, and did not contend that the charges, if any, were true, or that the plaintiff was not a man of good character and standing; but, after the judge refused to rule, as matter of law, that the article was not libellous, called two witnesses, who testified in mitigation of damages that the article, with the exception of that part detailing the interview with the plaintiff's wife, was taken bodily from the New York Sunday Recorder, a newspaper published in that city, and the defendant's counsel argued to the jury that, as matter of fact, there was no libel, and, even if they should find that the article might be construed to be a charge against the plaintiff's character, it was so near the line that he should not be awarded more than nominal damages; and that, in order to give the plaintiff substantial damages, they must find that the charges made, if any, were such as materially to injure a man of good standing in the community. There was no evidence of special damages.

At the close of the evidence, the defendant asked the judge to rule as follows:

"1. The article as set forth in the declaration is not reasonably capable of any defamatory meaning, and cannot be reasonably understood in a defamatory sense, and, as matter of law, the publication is not libellous.

"2. If the jury find that the article taken as a whole injured the plaintiff in his feelings and character, but find that the injury was slight, they may award nominal damages; and if they find that the defendant has only just overstepped the line, and that

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the action should not have been brought, then the damages must be nominal."

The judge refused so to rule; and the defendant excepted.

The judge instructed the jury, among other things, as follows:

"If you find that this is a charge of adultery, or that the article as a whole has a tendency to injure the standing and character of the plaintiff and hold him up to disgrace, then you come to the question of damages. It is not a case, if you find that to be a charge of adultery, where the plaintiff has to prove special damages, to show that he lost this or that patient, because the jury have a right to say, when a man is charged with a crime, that that does him an injury, and to say how much his damage shall be, without special proof of damages. He is entitled to damages for anything he suffered by way of personal feeling, grieving, on account of such a charge being published. And you have a right to consider what a citizen of good standing would feel to have an article of that kind published about him, accusing him of having succumbed to the pretty charms of the caterer's wife, under the circumstances stated. You have a right to consider what would be the injury to any honorable man's feelings by having such a charge as that published in the Boston Journal in the way this was published, and circulated among his friends and neighbors. And he is entitled to damages on that account, because it is what a man suffers in consequence of a libel, and that is one of the elements. He has told you himself in some degree how it affected him, and how it affected the business that he was engaged in, and it was a source for a long time of jest, but of more serious matter than jest among his friends. That may be taken into consideration in determining what the damages are. In other words, being just to the Boston Journal, and being just to Dr. Heber Bishop, you are to say what is a reasonable compensation in dollars and cents for having such an article as that published under the circumstances under which this was published; and all the natural results coming from that article, in the way of damages, he is entitled to recover. . . .

"Now I think this is a good case to submit to twelve men in Suffolk County, to say what damages a plaintiff shall have who has been treated as Dr. Bishop has. Has he been injured, or has the defendant pursued a proper and justifiable course in which to

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treat a citizen who is a man of good character, and where the defendant does not set up the truth? Or has the defendant, while the plaintiff is away, tried to find out what the truth is, and then published the libel with the truth, with the allegation of the wife? Now, you will have this article before you; it is put in the declaration exactly, I understand, as it was printed, and the first question is, Do you find that to be, as I have suggested, that paragraph with the whole article to be practically a charge of adultery? If it is, and it is not true, — and it is not claimed to be true, — then the plaintiff is entitled to whatever damages you think a man is entitled to, who has a good character and who is above reproach, who is accused in a public journal like the Boston Journal of that crime, and sent out under the circumstances under which this was; because you are to take in mitigation, if there is anything in mitigation of it, — you are to take into consideration that the defendant had published what was published in New York, that the article was not true, so that when the defendant published this article it had not only the fact that Mrs. Bishop, but that Dr. Bishop also, denied that there was any truth in that accusation. But still the defendant published it with their denial.

"Now, it is for you to say whether the defendant is justified in doing that, or whether, when the defendant found out both from the plaintiff and his wife, acting separately and from different sources, that there was not a word of truth in the article, that it was a gross libel, the defendant can go on and publish it, and then set up as an excuse that the defendant consulted both the plaintiff and his wife, and that they both said that it was not true. And if you say it is a libel under the rules I have given you, you are to say what the damages are."

The defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

R. F. Sturgis, for the defendant.

P. H. Cooney, for the plaintiff, was not called upon.

MORTON, J. We think that the article clearly was defamatory. Even if it did not impute adultery to the plaintiff, it tended to subject him to public ridicule and to charge him with misconduct, and to impair his reputation and standing in the

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community, and was therefore libellous. If it did impute adultery, as the jury might have found that it did, it was still more libellous. It cannot be regarded as a vindication of the plaintiff, even if we assume that a publisher of a newspaper may print a libellous statement for the purpose of pronouncing it false. The fact that a libel may not be believed does not excuse the party who publishes it, nor deprive the plaintiff of all except nominal damages. *Kenney* v. *McLaughlin*, 5 Gray, 3. *Markham* v. *Russell*, 12 Allen, 573. *Marble* v. *Chapin*, 132 Mass. 225. The article being libellous, it was for the jury to determine the damages. The defendant was liable for the natural consequences of the tort which it had committed. *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238. Whether those were of a character to entitle the plaintiff to substantial damages, or only to nominal damages, was for the jury to decide, and they were in effect so instructed. The rulings asked for were rightly refused.

The defendant objects that certain portions of the charge on the question of damages tended unduly to bias and influence the jury. The tone of a charge is not a subject of exception, unless the effect of the charge is to cause a mistrial or a failure of justice. *Beal* v. *Lowell & Dracut Street Railway*, 157 Mass. 444. We do not think that such was the case here. The defendant did not contend that the charges were true. The article was sensational in character, and was printed in a sensational style, and the jury properly may have found that it was a gross libel, though the defendant was innocent of any malicious intent, and that the plaintiff had been greatly injured in his feelings and reputation by it, and they may have awarded him compensation accordingly, as they had the right to do.

Exceptions overruled.

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JOHN MOTHERWAY *vs.* JOHN WALL.

Suffolk. December 1, 1896. — May 20, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Equity — Cancellation of a Deed — Fraud.

At the hearing on a bill in equity, brought to obtain the cancellation of a deed by which the plaintiff conveyed to the defendant all rights in the property of his deceased wife, there was evidence that the plaintiff's wife had died without issue seised of real estate of the value of $3,100, which, without the written consent of the plaintiff, she had devised to her brothers and a sister; that the defendant, who was the executor of her will, represented to the plaintiff that he had no rights or title to his deceased wife's house, and that nothing had been left to him by her will, and told him that he, the defendant, would do the best he could for him; and that subsequently the defendant procured the plaintiff to execute the deed in question upon the payment to him of the sum of $400. Evidence was also offered and excluded that the defendant, prior to the execution of the deed, said to the sister of the plaintiff that the plaintiff "had been left out, and there was nothing in the will for him, and he can get more with me than he can get in any other way, . . . the will is made and not one dollar to" the plaintiff; that the defendant then offered to let the property to her, telling her that he had the whole charge of it; that he had asked D., one of the devisees in the will, to testify that he had sent the plaintiff to the defendant to arrange for a sale of the property, and that, on receiving D.'s reply that he would not lie for anybody, the defendant said he had no further use for him. *Held*, that the excluded evidence should have been admitted, and that it, in connection with the testimony in the case, would have warranted a finding that the deed was procured by fraud, from which the plaintiff was entitled to relief.

BILL IN EQUITY, filed in the Superior Court on February 27, 1893, to obtain the cancellation of a deed alleged to have been procured by fraud.

The bill alleged that Mary Motherway, the wife of the plaintiff, died on February 16, 1893, without issue, leaving as her next of kin three brothers and a sister; that she was seised of real estate which, with all her other property, by her will, dated December 30, 1892, she bequeathed and devised to her two brothers, Thomas and John Duggan, and to her sister, Kate Cullinan; that the plaintiff at no time gave his written consent to the will, nor did he know the provisions thereof until after the death of his wife; that on February 20, 1893, the defendant, who was named by Mary Motherway as the executor of her will, informed the

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plaintiff that he was not provided for in his wife's will, and that he had no rights or interest therein; that unless he followed the defendant's instructions he would get nothing, but that he, the defendant, would see that the plaintiff got something out of the estate, and that, if the plaintiff would make a deed of his interest in the estate to the defendant, the latter would pay to him the sum of four hundred dollars; that the plaintiff, being ignorant of his rights, and believing the statements of the defendant, executed to him a warranty deed, for which he received from the plaintiff the sum of four hundred dollars; that such sum was not an adequate consideration for the plaintiff's interest in his wife's estate, as the defendant, who intended to defraud and deceive the plaintiff, well knew; and that the plaintiff was ready to return to the defendant the money received from him.

The prayer of the bill was that the defendant should be enjoined from conveying or encumbering the property conveyed by the plaintiff; that he should be ordered to deliver up and cancel the deed executed by the plaintiff; and that the same should be declared void.

The defendant filed an answer, and also demurred to the bill for want of equity. Issues were framed for the jury, which were tried in the Superior Court before *Sherman*, J., who allowed a bill of exceptions in substance as follows.

The plaintiff is the husband of Mary Motherway, who died testate on February 16, 1894, without issue. By her will she bequeathed and devised all her property, real and personal, to her sister, Kate Cullinan, and to her brothers, Thomas and John Duggan, and appointed the defendant her executor. The plaintiff did not assent in writing to the will, and did not know its provisions when it was made. The personal property of the testatrix was of little or no value, but the value of her real estate was thirty-seven hundred dollars, which was subject to a mortgage of six hundred dollars.

The plaintiff testified that he and his wife had been married about five years, and that they had had no children; that a few days after her death, the defendant came down to the house where she died, and told the plaintiff that he had no title to the house, that he had no business there, and that he ought to go to work; that he would do the best he could for the plaintiff; that

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in the afternoon of the same day he took the plaintiff to a lawyer's office in Boston, first going to a bar-room, where they both had three or four drinks; that in the lawyer's office his wife's will was shown to the plaintiff, who, though not able to read well, read a part of it; that nothing was said to him about the will or his rights under it; that the defendant said he would give the plaintiff four hundred dollars, and did give him ten dollars then, and on the following day the plaintiff obtained the balance at a savings bank, after which the defendant told him the best thing he could do was to go home; that he had no business around there as long as he had money enough; that the defendant also said, "Don't say that Wall did this, or Wall said that, but skip out." The plaintiff further testified that he supposed he must have signed the deed, but that he did not remember taking an oath or acknowledging the deed.

On cross-examination, he testified that he could write his name, but could not read; that he supposed he wrote his name to the deed, but only the defendant and a boy were then present, that the defendant offered him four hundred dollars, but he could not tell what it was offered for; that the defendant told him nothing about real estate, nor anything about his rights in it; he told him there was nothing left him by the will; that the lawyer showed him the will and said, "There is nothing left for you there"; and that no one read the will to him, but that he was offered the money, and he signed the deed.

The deed, which was the usual warranty deed, was executed, acknowledged, and recorded on February 20, 1893, and recited that the plaintiff gave, granted, bargained, sold, and conveyed to John Wall, his heirs and assigns, all the right, title, and interest "in and to any and all estate, both real and personal, of which Mary Motherway, my late wife, died seised, and to which she was entitled at the time of her decease."

One Connelly, a sister of the plaintiff, testified to a conversation with the defendant relative to the property, on February 20, 1893, but previous to the signing of the deed. The conversation, which was offered by the plaintiff, and, subject to his exception, excluded, was as follows. Connelly said to the defendant, "I don't want you to cheat John Motherway." The defendant replied that Motherway had been left out, and there

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was nothing in the will for him, and that he could get more with him than he could get in any other way. Connelly said, "Mr. Wall, Motherway is to get a lawyer himself so as to get his share of the property," to which the defendant replied, "The will is made, and not one dollar to Motherway." The witness replied, "That is very wrong, as all his labor and earnings were there." The plaintiff then offered to prove by the same witness that, before the deed was signed, the defendant offered to let to her the property at a reduced rate, saying that he had the whole charge of it; and that when the plaintiff came home in the evening after signing the deed he was badly intoxicated.

This evidence was excluded, and the plaintiff excepted.

The same witness further testified that on the day following the signing of the deed she went with the plaintiff to the savings bank, and on leaving it the defendant said to the plaintiff, "John, don't go around and say Mr. Wall said this and Mr. Wall said that, and Mr. Wall done this and Mr. Wall done that. Keep your mind to yourself, and you go into your house, and get the keys of one room, and furnish it with plenty of bedclothes, and stay there until I tell you to leave it", and he added that the best thing Motherway could do for himself was to go home to his father and mother.

Evidence was then offered that the plaintiff was addicted to the excessive use of intoxicating liquors, and that, in consequence of an injury to his head received some time before, he was mentally deficient.

This evidence was excluded, and the plaintiff excepted.

Evidence was then offered to show that, before the trial of this case, the defendant sent for Thomas Duggan, a brother of the plaintiff's wife, and desired him to testify that he had sent the plaintiff to the defendant to arrange for a sale of the property; and that, when Duggan replied that he would not lie for anybody, the defendant said he had no further use for him.

This evidence was excluded, and the plaintiff excepted.

Evidence was then offered to show that the defendant did not receive nor treat the property conveyed as trust property for the heirs, but received it to his own use, and refused to convey it to the heirs, or to recognize their interests in it.

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This evidence was excluded, and the plaintiff excepted.

At the close of the plaintiff's case, *Sherman*, J., ruled that there was not sufficient evidence to justify a finding by the jury that the deed from the plaintiff to the defendant was procured by fraud, and on the following issue, "Was the said deed from the plaintiff, John Motherway, to the defendant, John Wall, procured by the fraud and deception of the said defendant, John Wall, practised upon the plaintiff?" he directed the jury to return an answer in the negative.

The case was then heard upon the bill, answer, and the finding of the jury, as directed; and the judge ordered the bill to be dismissed. The plaintiff alleged exceptions.

W. Schofield, for the plaintiff.

S. K. Hamilton, for the defendant.

MORTON, J. We understand that the plaintiff excepted to the ruling that there was not sufficient evidence to warrant the jury in finding that the deed was procured by fraud. The principal questions are whether there was evidence, including any which should have been admitted, tending fairly to show that the defendant obtained the deed by fraud, and whether, if there was, the plaintiff is entitled to relief.

We think that there was evidence on which the jury fairly might have found that the deed was procured by fraud. The plaintiff's wife died seised of the real estate in question, which was less in value than $5,000. She left no issue, and the plaintiff did not assent in writing to the will. The real estate therefore descended to him. Pub. Sts. c. 124, § 1. Pub. Sts. c. 147, § 6. St. 1887, c. 290, § 2. St. 1889, c. 204, § 1. *Lavery* v. *Egan*, 148 Mass. 389. *Lincoln* v. *Perry*, 149 Mass. 368. *Johnson* v. *Williams*, 152 Mass. 414.

The defendant was executor of the will, and may be assumed to have known the actual state of the title. There was evidence tending to show that he represented to the plaintiff that he had no rights or title in the house, but that he would do the best he could for him, and that the best he (the plaintiff) could do would be to go to work. There was also evidence tending to show that he told the plaintiff that there was nothing left for him in the will, — meaning that the plaintiff should understand thereby, as the jury might have found, that he had no rights in the property

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except such as he derived under the will. This evidence and that of the witnesses Connelly and Duggan, which we think should have been admitted, would have warranted the jury in finding that the deed was obtained by fraud. *Burns* v. *Dockray*, 156 Mass. 135. *Nash* v. *Minnesota Title Ins. & Trust Co.* 159 Mass. 437.

The question remains whether the plaintiff would be entitled to relief. We think that he would be. He must be presumed to have known the law, however ignorant of it he may have been in fact. But his case is not one simply of ignorance or mistake in respect to the law. The defendant's representations, though involving to some extent matters of opinion, were not so expressed, and related to a question of fact, namely, the right or title of the plaintiff. *Nash* v. *Minnesota Title Ins. & Trust Co.*, and *Burns* v. *Dockray*, *ubi supra*. It has been said that "a representation concerning a man's private rights, though it may involve matters of law, is as a whole deemed to be a statement of fact." Pollock, Torts, 242. See also *Alton* v. *First National Bank of Webster*, 157 Mass. 341. Even in the case of a mistake of law, it has been held that "inequitable, unfair, and deceptive conduct which tends to confirm the mistake and conceal the truth" will entitle a party to relief in equity. *Haviland* v. *Willets*, 141 N. Y. 35. We find no error in regard to the exclusion of testimony, except that already referred to.

We assume that the demurrer has been overruled or waived, although upon the papers before us no disposition appears to have been made of it.

On the whole case, we think that, as provided in the exceptions, the finding and decree must be set aside, and the case stand for trial.

So ordered.

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JONAS M. MILES & another *vs.* ARTHUR P. SCHMIDT.

Suffolk. December 3, 1896. — May 20, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Illegality of Agreement to submit Disputes to Arbitration.

An agreement, the evident intent of which is to submit all disputes relating to the performance thereof to the final decision of a tribunal constituted by the parties themselves, the referees both to assess damages and to determine whether there have been any violations of the agreement, and their decision in all matters to be final, is illegal and void.

BILL IN EQUITY, to enforce the specific performance of a written contract.

The defendant demurred to the bill, assigning as ground therefor the following arbitration clause contained in the contract:

"It is further mutually agreed that in case of any alleged violation of the promises and agreements herein made by said Schmidt or by said firm, if such alleged violation is continued after thirty days' notice in writing from the other to the party charged as guilty of such violation, requiring such party to cease such violation, then the party so guilty shall be liable to the other for all damages caused by such violation, to be determined by a board of referees in manner as follows.

"After the expiration of the thirty days' notice provided for in the above clause, said Schmidt and said firm shall each forthwith appoint a referee, and the two so appointed shall appoint the third. If either party fails to appoint a referee for ten days, after written notice of such appointment by the other party, then the referee so appointed shall appoint a second, and the two so appointed shall appoint a third.

"The referees shall proceed forthwith to hear the parties and to determine whether or not there has been any violation of the agreements herein contained, and whether the same has continued for more than thirty days after notice to discontinue such violation above provided for, and what damage either party has sustained by reason of such violation.

"The decision of a majority of said referees shall be final and

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binding on said parties, and they hereby agree to abide by, submit to, and forthwith to comply with any decision, or award, of a majority of said referees. The expense of any such reference shall be borne by any or all the parties in such proportion as said referees may determine."

The Superior Court sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court.

C. B. Southard, (*T. Parker* with him,) for the plaintiff.

H. M. Rogers, for the defendant.

MORTON, J. Perhaps, if the question were a new one, no objection would be found to permitting parties to select their own tribunals for the settlement of civil controversies, even though the result might be to oust the courts of jurisdiction in such cases. But the law is settled otherwise in this State. *Rowe* v. *Williams*, 97 Mass. 163. *Wood* v. *Humphrey*, 114 Mass. 185. *Pearl* v. *Harris*, 121 Mass. 390. *Vass* v. *Wales*, 129 Mass. 38. *White* v. *Middlesex Railroad*, 135 Mass. 216. When the question is a preliminary one, or in aid of an action at law or suit in equity, such, for instance, as the ascertainment of damages, an agreement for arbitration will be upheld. *Wood* v. *Humphrey*, 114 Mass. 185. *Reed* v. *Washington Ins. Co.* 138 Mass. 572, 575. *Hutchinson* v. *Liverpool & London & Globe Ins. Co.* 153 Mass. 143. The defendant contends that the agreement for arbitration in this case goes no further than the assessment of damages. But it is expressly provided, amongst other things, that the referees shall "hear the parties and determine whether or not there has been any violation of the agreements herein contained, . . . and what damage either party has sustained" thereby, and that "the decision of a majority of said referees shall be final and binding on said parties." The evident intent is to submit all disputes relating to the performance of the agreement to the final decision of a tribunal constituted by the parties themselves. The referees are not only to assess the damages, but also are to determine whether there have been any violations of the agreement, and their decision in all matters is to be final. The agreement to submit to arbitration was therefore in violation of law, and the demurrer should have been overruled.

Demurrer overruled, and decree dismissing bill set aside.

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JOHN O. TEELE, trustee, *vs.* BISHOP OF DERRY & others.

Suffolk. December 7, 8, 1896. — May 20, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Public Charity — Cy Pres — Lapsed Legacy.

A bequest to trustees for the purpose of purchasing a lot and building a chapel in the town of C., in Ireland, to "forever be used for purposes of public worship under the auspices of the Roman Catholic Church," is a gift for a public charitable use.

The fact that a charity is to be administered in a foreign country does not of itself render it invalid.

The fact that a bequest is in the nature of a public charity does not require of itself that the court should frame a scheme to carry it out as near as may be to the purpose of the testator, if, for any reason, that has become impossible of performance in the manner which he has provided.

If a charitable purpose is limited to a particular object or to a particular institution, and there is no general intent, then if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of *cy pres* does not apply, and, in the absence of any limitation over, or other provision, the legacy lapses.

BILL IN EQUITY, filed January 24, 1893, by the trustee under the will of Margaret Bralley, to obtain the instructions of the court upon the following provisions thereof:

"Eighteenth. I request that my trustees herein named may set aside a sum not exceeding twelve thousand dollars to be expended by them in the purchase of a lot and the building of a chapel thereon, in my native place, Carndrine, County Tyrone, Ireland, the title thereof to be vested in the Bishop of that diocese and his successors in office, and upon the trust that said chapel and lot shall forever be used for purposes of public worship under the auspices of the Roman Catholic Church.

"I do not intend to charge my trustees with the responsibility of attending in person to the purchase of the lot and the building of the chapel, but they may make the selection of the lot and contract for the erection of the chapel by correspondence with the Bishop of that diocese, and when they have made terms, conditions, and contracts with said Bishop to their satisfaction, they may pay over the money to him to such an amount as they may

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have agreed upon with him for the purposes of this bequest, and the receipt of said Bishop therefor shall be a complete discharge of my said trustees from all responsibility on their part in that regard.

"The amount of money to be expended for such lot and chapel, and the time and manner of its payment, shall be left wholly to the decision of my said trustees except as herein expressly provided, but I wish to relieve them from the responsibility of superintendency in person, the expenditure of the money in Ireland, unless they should see fit to take that responsibility upon themselves."

Hearing before *Morton*, J., who reported the case for the determination of the full court. The facts appear in the opinion.

C. R. Darling, (*W. S. Slocum* with him,) for the Bishop of Derry.

W. M. Noble, for the residuary legatees.

MORTON, J. We think that the bequest to trustees for the purpose of purchasing a lot and building a chapel in Carndrine, Ireland, to "forever be used for purposes of public worship under the auspices of the Roman Catholic Church," was a gift for a public charitable use. *Attorney General* v. *Briggs*, 164 Mass. 561, 567. *Bartlett, petitioner*, 163 Mass. 509, 514. *McAlister* v. *Burgess*, 161 Mass. 269. *Sears* v. *Chapman*, 158 Mass. 400. The fact that the charity would be administered in a foreign country does not of itself render the gift void, and there is nothing to show that it would not be a good public charity by the law of Ireland. *Fellows* v. *Miner*, 119 Mass. 541, 546. *Washburn* v. *Sewall*, 9 Met. 280. *Burbank* v. *Whitney*, 24 Pick. 146, 154. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424, 432. Neither does the fact that the bequest is in the nature of a public charity require of itself that the court should frame a scheme to carry out as nearly as may be the purpose of the testatrix, if, for any reason, that has become impossible of performance in the manner which she has provided. "Assuming that the object is a charity, still there is no universal principle that the testator's particular intentions must be sacrificed by reason of that general object." *Bullard* v. *Shirley*, 153 Mass. 559, 560.

The difficulty in this case, and generally in cases like it, is

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one of construction, — to find out the intention of the testatrix. When that is arrived at, the rules of law which apply seem to be pretty well settled. If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then if by a change of circumstances or in the law it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of *cy pres* will be applied in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated. There are numerous cases in which this rule has been applied. *Attorney General* v. *Briggs*, 164 Mass. 561. *Sears* v. *Chapman*, 158 Mass. 400. *Weeks* v. *Hobson*, 150 Mass. 377. *Theological Education Society* v. *Attorney General*, 135 Mass. 285. *Jackson* v. *Phillips*, 14 Allen, 539. *American Academy* v. *Harvard College*, 12 Gray, 582. *Church of Jesus Christ* v. *United States*, 136 U. S. 1. *Lyons* v. *Advocate General of Bengal*, 1 App. Cas. 91. *In re Maguire*, L. R. 9 Eq. 632. *In re Prison Charities*, L. R. 16 Eq. 129, 140, note. *In re Campden Charities*, 18 Ch. D. 310. *Biscoe* v. *Jackson*, 35 Ch. D. 460. *In re Slevin*, [1891] 2 Ch. 236.

But if the charitable purpose is limited to a particular object or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of *cy pres* does not apply, and, in the absence of any limitation over or other provision, the legacy lapses. There are many cases which, it has been held, fall within this rule. *Bullard* v. *Shirley*, 153 Mass. 559. *Stratton* v. *Physio-Medical College*, 149 Mass. 505. *Easterbrooks* v. *Tillinghast*, 5 Gray, 17. *Clark* v. *Taylor*, 1 Drew. 642. *Corbyn* v. *French*, 4 Ves. 418. *Russell* v. *Kellett*, 3 Sm. & Giff. 264. *Fisk* v. *Attorney General*, L. R. 4 Eq. 521. *In re Ovey*, 29 Ch. D. 560. *In re White's trusts*, 33 Ch. D. 449. *In re Rymer*, [1895] 1 Ch. 19. *Carbery* v. *Cox*, 3 Ir. Ch. 231. *Attorney General* v. *Bishop of Chester*, 1 Bro. C. C. 444. *Cherry* v. *Mott*, 1 Myl. & Cr. 123.

The latest case in this Commonwealth in which the doctrine of *cy pres* has been applied is *Attorney General* v. *Briggs*, *ubi*

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supra, in which it was held that there was manifest on the part of the testator a general intent to promote education in the neighborhood, and a purpose that the whole town would have the benefit of his bounty, if it could not otherwise be made available to the district which he had designated. In the present case the bequest is not for general religious purposes, nor is there anything to indicate that the object of the testatrix was to benefit the parish as a whole. Her object evidently was to provide a place in the village of Carndrine where the inhabitants could attend religious services and have the rites of their church administered without being obliged to go several miles to the parish church at Aughayarron, or to Castlederg in the neighboring parish. Her purpose was that a lot should be purchased and a chapel built at Carndrine for the benefit of the inhabitants there, not that the bequest should be devoted to repairing the church at Aughayarron or otherwise for the general benefit of the parish. The particularity of the language used forbids, we think, any other construction. Thus she requests her trustees to set aside a sum "to be expended by them in the purchase of a lot and the building of a chapel thereon in my native place, Carndrine, . . . the title thereof to be vested in the Bishop . . . upon the trust that said chapel and lot shall forever be used," etc. Again she says, "I do not intend to charge my trustees with the responsibility of attending in person to the purchase of the lot and the building of the chapel, but they may make the selection of the lot and contract for the erection of the chapel," etc. Still further, she provides that "the amount of money to be expended for such lot and chapel, and the time and manner of its payment, shall be left," etc.

From this it appears, we think, as already observed, that the leading purpose in the mind of the testatrix was the purchase of a lot and the building of a chapel at Carndrine for the benefit of those living there, and that to divert the bequest to repairing the parish church, or for a parish house, or to enlarging the parish graveyard at Aughayarron, which are the schemes suggested, would be devoting it to purposes inconsistent and at variance with those designated by the testatrix and not in furtherance of any general charitable intent on her part. We think that a general intent to advance religion in the parish hardly can be

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inferred from the purpose thus particularly expressed to build a chapel in Carndrine.

It is found that it will be impracticable to carry out the scheme which the testatrix had in mind, and that it will be a wasteful expenditure of the trust fund to purchase a lot and build a chapel at Carndrine. The population is small, not over one hundred, of whom about four fifths are Roman Catholics, and is diminishing. The people are too poor to support a chapel, and the Bishop refuses to assist in maintaining a chapel or supporting a priest, and without his help the people could do neither.

The purpose which the testatrix had in view has failed, therefore, and the case not being one in which the doctrine of *cy pres* properly can be invoked, it follows that the bequest must be held to have failed, and to pass under the residuary clause. See *New* v. *Bonaker*, L. R. 4 Eq. 655. *Decree accordingly.*

JOSEPH W. SMITH *vs.* FRANKLIN PARK LAND AND IMPROVEMENT COMPANY.

Suffolk. December 9, 1896. — May 20, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Increase of Capital Stock — Bill in Equity to compel the Issue of Certificates of Stock.

A bill in equity cannot be maintained to compel a corporation, whose business is the buying and selling of real estate, to issue certificates for certain shares of its capital stock where it appears that the directors, pursuant to authority given to them by the stockholders, voted to increase such capital stock, and to authorize the president to sell or issue, in such manner as he saw fit, so much thereof as should not be taken by the stockholders; and that the president sold to the plaintiff, at private sale, certain shares of such new stock, and for money paid thereon gave a receipt, on behalf of himself and the corporation, reciting that, after a time stated, "a certificate for said shares will be issued by said company to the holder of this receipt, upon surrender of the same and payment in full for said shares at the par value," although, after the time stated, the plaintiff tenders payment in full for the stock and offers to surrender the receipt.

BILL IN EQUITY, filed March 14, 1896, to compel the defendant corporation to issue certificates on certain shares of new capital stock held by the plaintiff.

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The bill alleged that on March 30, 1889, at a meeting of the directors of the defendant corporation, pursuant to authority given to them by the stockholders, it was voted that the capital stock of the corporation be increased from one hundred thousand to five hundred thousand dollars by the issue of sixteen thousand additional shares of a par value of twenty-five dollars each, and that all shares not taken by the stockholders in accordance with such vote should be sold or issued by the president of the company in such manner as he should see fit, but that no share should be sold or issued for a less amount than the par value thereof; that on May 1, 1889, Francis M. Holbrook applied to Moody Merrill, president of the corporation, for two hundred and fifty shares of such new stock, and paid to him, in part payment therefor, the sum of six thousand dollars, for which he was given a receipt, stipulating that on or after May 1, 1889, a certificate for such shares should be issued to the holder thereof upon surrender of the receipt, and payment in full for such shares at the par value thereof; and that on April 29, 1895, Holbrook sold to the plaintiff his interest in such shares, and transferred to him the receipt therefor. The bill, after reciting similar sales on May 1 and September 4, 1889, to Francis M. and Lucy A. Holbrook of two hundred and ninety-two additional shares of such stock, which were paid for in full, for which similar receipts were given, and which were in like manner transferred to the plaintiff, further alleged that the stock held by the plaintiff was not taken by the stockholders within the time limited by the vote of the directors, and that they were included in those shares which the president of the corporation was authorized to issue and sell; that shortly after May 1, 1889, and at divers other times prior to the assignment of the receipts to the plaintiff, Francis M. Holbrook, for himself and Lucy A. Holbrook, requested the president of the corporation, Moody Merrill, to issue certificates for the shares of stock so sold by him, tendering to him, for the corporation, the balance due for the two hundred and fifty shares of stock first sold to him and offering to surrender all of the receipts given by him; that Merrill in behalf of the corporation promised that such shares of stock would soon be issued and delivered, but that they never were issued and delivered; that until May, 1892, in-

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terest was semi-annually paid to Francis M. and Lucy A. Holbrook on the money paid by them; that in May, 1893, Holbrook requested the treasurer of the corporation to issue certificates for the shares of stock for which such receipts were held, and was informed that the treasurer had no authority to issue such certificates or stock, and that he declined so to do; that after the assignment of the receipts to the plaintiff he tendered to the defendant the balance due on the stocks so sold, and offered to surrender all the receipts given by Merrill, and requested the defendant and its president to issue to him a certificate for five hundred and forty-two shares of such new stock, but the defendant refused so to do.

The prayer of the bill was that the defendant might be ordered to issue a certificate for five hundred and forty-two shares of its new capital stock upon payment by the plaintiff of the balance due and the surrender of the receipts.

The vote of the directors to which reference was made in the plaintiff's bill was as follows: "Voted that, pursuant to the authority given by the stockholders to the directors at a special meeting held March 27, 1889, the capital stock of the corporation be increased from one hundred thousand dollars ($100,000) to five hundred thousand dollars ($500,000) by the issue of sixteen thousand (16,000) shares of a par value of twenty-five dollars ($25) each, and that written notice of this increase be given to each stockholder who was such at the date of the vote to increase (March 27, 1889), stating the amount of the increase, the number of shares or fractions of the new stock which said stockholder is entitled to take, and the time (which shall be thirty days) from the giving of such notice within which such new stock shall be taken, and within said time each stockholder may take at par his proportion of such new shares according to the number of his shares at the date of such vote to increase (March 27, 1889), and the shares which are not so taken shall be sold or issued by the president in such manner as he shall see fit, but no shares shall be sold or issued for a less amount than the par value thereof."

The receipts given by the president of the defendant corporation to Francis M. and Lucy A. Holbrook, and the transfers thereon, were, except as to date, amounts paid, and number of

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shares, identical in form with the receipt given on September 4, 1889, a copy of which is as follows:

"Franklin Park Land and Improvement Co. — Interest allowed on all payments @ 6%.

"Boston, Sept. 4, 1889.

"Received of Frank M. Holbrook, of Boston, Mass., the sum of five hundred and twenty-five dollars, in full payment for twenty-one (21) shares in the capital stock of the Franklin Park Land and Improvement Company, at the par value of twenty-five dollars per share. On May 1st, 1889, or at any time thereafter, a certificate for said shares will be issued by said Company to the holder of this receipt, upon surrender of the same and payment in full for said shares at the par value named herein.

"Six months interest paid to Nov. 15, 1890. $15.75.
" " " May 1891.
" " " Nov. "
" " " May 1892.

"Moody Merrill, Prest. and for self."

The following transfer appears on the back of the above receipt:

"Apr. 29, 1895. I hereby sell and transfer this receipt and my interest in the shares named therein to Joseph W. Smith of Boston. Francis M. Holbrook."

The defendant demurred to the bill for want of equity, and on a hearing in the Superior Court the bill was dismissed; and the plaintiff appealed to this court.

C. F. Eddy, for the plaintiff.

W. Emery, for the defendant.

MORTON, J. Assuming that the receipts were given on behalf of the corporation, and that the money was received by Merrill for it, we come to the question whether the corporation had power to authorize the president to sell and issue shares in such manner as he saw fit, and whether private sales by him, which the sales in this case were, were valid sales, and such as this court will enforce. It is to be observed that it is nowhere alleged in the bill that the capital stock was increased by the stockholders. From the vote of the directors, it would appear as though they increased it pursuant to authority purporting to

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be given them by the stockholders, which manifestly could not be done. It seems to have been assumed on both sides, however, that the increase was the result of proper action on the part of the stockholders, and we proceed on that assumption.

The bill does not allege how or when the defendant company became a corporation, or for what purpose it was organized. It is recited in St. 1889, c. 102, § 1, that it was organized under the general laws of this Commonwealth, and from that act and St. 1887, c. 168, and from its name, we infer that its business is that of buying and selling real estate. If so, Pub. Sts. c. 106, § 37, would seem inapplicable, because the defendant corporation could not organize under that chapter (see § 14), and, so far as appears, does not come within the enumeration of those described in § 3 as governed by its provisions. But even if c. 106, § 37, does apply, the plain implication of that section is that the stockholders must direct by vote the manner of sale, and cannot delegate their power. See *Mason* v. *Davol Mills*, 132 Mass. 76; *Crosby* v. *Dracut*, 109 Mass. 206; *Harris* v. *Marblehead*, 10 Gray, 40; *In re Leeds Banking Co.* L. R. 1 Ch. 561; *Monmouth Ins. Co.* v. *Lowell*, 59 Maine, 504; *Silver Hook Road* v. *Greene*, 12 R. I. 164; *Farmers' Ins. Co.* v. *Chase*, 56 N. H. 341; *Rutland & Burlington Railroad* v. *Thrall*, 35 Vt. 536.

The plaintiff relies on Pub. Sts. c. 105, § 20. That section requires the untaken shares to be sold by the directors at public auction. The stock which is the subject of the present suit was not only not sold at public auction, but was sold in a manner which was the opposite of that contemplated by the statute. We do not see how the plaintiff can maintain a bill to compel the issue of certificates representing stock thus sold. Very likely, as the plaintiff argues, if the certificates had been issued and delivered, the corporation could not maintain a bill for their cancellation and return. But that is very different from saying that the corporation can be compelled to issue certificates for stock which it has sold, if not in violation of law, at least in a manner in which it had no authority to sell it.

Whether the plaintiff has any other remedy it is not necessary for us to consider. For the reasons given, we think that the present bill cannot be maintained.

We have not found it necessary to consider the question of laches. *Decree affirmed.*

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MARY A. DOLAN *vs.* HENRY BROOKS.

Suffolk. January 12, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Contract — Husband and Wife — Agency — Necessaries.

A husband is not liable for a dress furnished to his wife where it appears that, although they lived together, and that he paid all their household expenses, as well as some bills for her clothing contracted for in his name, the wife for a period of ten years had, out of her private income, paid for most of the clothing of herself and of her daughters, and where it does not appear that the husband had refused or neglected to provide the wife with suitable clothing, or that the dress in question, although suitable to her station in life, was necessary, or that credit was not given to her.

CONTRACT, to recover the price of a dress furnished by the plaintiff to the wife of the defendant.

At the trial in the Superior Court, without a jury, before *Dunbar*, J., there was evidence tending to show that the plaintiff was a dressmaker in Boston; that on or about April 2, 1895, the wife of the defendant ordered from her an imported French costume, consisting of a waist, skirt, and cape, at an agreed price of two hundred dollars; that the cape was delivered to the wife of the defendant on or about April 20, 1895; that she subsequently had the balance of the costume fitted to her two or more times, the last time being on May 6, 1895; that on May 20 the defendant's wife returned the cape to the plaintiff, at the same time stating in a letter that she had "waited quite long enough for it," and that she did not care "to pay two hundred dollars for a gown that has been hanging around your work-rooms for nearly two months"; that thereupon the plaintiff sent back to the defendant's wife the entire costume, including the cape, which Mrs. Brooks at once returned to the plaintiff.

The plaintiff testified that she had made about a dozen dresses for Mrs. Brooks in the six years preceding this transaction, the prices of which were from one to two hundred dollars apiece; that she gave credit to Mr. Brooks, who had never notified her not to furnish goods to his wife on his credit.

On cross-examination, she testified that she made her charges

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and sent her bills to Mrs. Henry Brooks, and that she never had had any transactions with the defendant.

The defendant testified that he never had any business transactions with the plaintiff; that his wife had a separate income, from which, for about ten years, she had paid for her clothing; that she had traded with the plaintiff for three or four years, paying her bills with her own checks; but that he had paid for some clothing contracted for by his wife.

On cross-examination, he testified that he paid substantially all of the bills for the maintenance of his household, except the clothing bills for his wife and daughters.

Mrs. Henry Brooks, the wife of the defendant, testified that she had had previous dealings with the plaintiff, and that she had always paid her with her own checks, and that the money with which she paid for her clothing was derived from her own income.

At the close of the evidence the plaintiff requested the judge to rule: "1. That the defendant is liable for goods purchased by his wife, if at the time of purchase the defendant and his wife were living together, and the goods purchased were suitable to her station in life; 2. That the defendant is liable for goods purchased by his wife, if at the time of purchase the defendant and his wife were living together, and the goods purchased were suitable to her station in life, and the defendant at that time, and for some time previous, had not in fact supplied his wife with such goods suitable to her condition in life; 3. That the defendant is liable for goods purchased by his wife, if at the time of purchase the defendant and his wife were living together, and the goods purchased were suitable to her condition in life, even if the wife had a separate income; 4. That the fact that the wife had a separate income — such fact being uncommunicated to the plaintiff — does not release the husband from his liability to pay for goods suitable to the wife's station in life, supplied by the plaintiff to the wife while husband and wife were living together; 5. That under the pleadings in this case, if the goods purchased were suitable to the wife's condition in life, and the defendant and his wife were at the time of purchase living together, the defendant is liable; 6. That articles of clothing supplied the wife, if furnished her during cohabitation with the husband, and if suitable to her condition in life, are necessaries."

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The judge declined to give the first five rulings requested, ruling in relation to the fourth request that the non-communication to the plaintiff of the fact that the wife had a separate income was immaterial. The judge also refused to give the sixth ruling requested, except in the following modified form: "Articles of clothing supplied the wife, furnished her during cohabitation with the husband, if actually needed by her and if suitable to her condition in life, are necessaries." The judge found for the defendant; and the plaintiff alleged exceptions.

W. B. F. Whall, for the plaintiff.

E. M. Johnson, for the defendant.

MORTON, J. The plaintiff does not rely upon the exceptions which she took to the admission of evidence, but she insists that the rulings requested by her should have been given.

The case was tried without a jury, and the court found generally for the defendant. One question was whether credit was given to the husband or to the wife. It is possible that the judge may have found that credit was given to the wife and not to the husband. If so, that disposed of the case on a ground which rendered inapplicable the rulings which were requested. The plaintiff contends, however, that the fact that the judge passed upon the rulings tends to show that he could not have disposed of the case on that ground, and we therefore pass to a consideration of the other questions involved.

It is not contended that the wife had express authority from the defendant to purchase the dress. The plaintiff relies on the obligation which a husband is under to furnish his wife with necessaries suitable to her station in life, and on the authority which she has by law, in case of his neglect to do so, to purchase them on his credit. The question is whether, under the circumstances of this case, the defendant is liable on that ground. A wife has not authority to purchase on her husband's credit such clothing as she deems suitable and proper. Generally speaking, it is only in cases of necessity that the law constitutes her his agent with authority to pledge his credit. This is the law in England, as well as here. *Raynes* v. *Bennett*, 114 Mass. 424. *Conant* v. *Burnham*, 133 Mass. 503. *Debenham* v. *Mellon*, 6 App. Cas. 24. *Jolly* v. *Rees*, 15 C. B. (N. S.) 628. It is possible that the husband's consent to or acquiescence in the doing

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of certain things by the wife may constitute her his agent *quoad* such matters. Such an agency may be presumed, perhaps, under some circumstances, in regard to those things relating to the family, for instance, which it is usual for the wife to do, and which she does without any question or objection on the part of her husband. *Debenham* v. *Mellen, ubi supra.* This case, however, as already observed, stands on a different ground from either of those just referred to.

The plaintiff and his wife were living together, and he paid all of the expenses for the maintenance of the household, except those for the clothing of his wife and daughters. The bulk of those was paid by the wife out of her income. She had been accustomed for ten years to do this, though the defendant had paid some bills for clothing contracted by her in his name. For aught that appears, her income was sufficient to clothe her suitably according to her station in life, and it fairly may be assumed that it was understood between them that it should be used by her in this manner. We do not see how, under such circumstances, the defendant can be held liable. Assuming that the dress was suitable according to her station in life, it does not appear that the defendant had refused or neglected to provide his wife with suitable clothing, and consequently one of the essential grounds in which the law raises an agency in the wife's favor to bind the husband was wanting. Further, the judge who heard the case may have found that, although the dress was suitable, it was not necessary.

We do not mean to intimate that the fact that a wife has an income of her own relieves the husband from his obligation to support her, or absolves him from liability for suitable clothing bought by her in consequence of his refusal or neglect to provide it for her. It is not necessary to decide that question now. See *Thorpe* v. *Shapleigh*, 67 Maine, 235; *Liddlow* v. *Wilmot*, 2 Stark. 86.

The rulings asked for assumed in one form or another that the defendant was liable. As we do not think that he is, it is unnecessary to consider them in detail. The modifications which the judge made in the fourth and sixth rulings asked for were rightly made.

Exceptions overruled.

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THOMAS B. GRIGGS *vs.* JOSEPH B. MOORS.

Suffolk. January 13, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Guaranty — Construction of Contract — Dependent Stipulations — "Security" — Condition Precedent — Waiver — Action — Defence — Estoppel.

A. and B. executed an agreement, which recited that whereas A. held C.'s promissory note, and, as security for its payment, held also a mortgage given by D. to C. securing D.'s note, and A. had brought suit against C. on his note and attached his property, and, at B.'s request and for his benefit, had filed a petition in insolvency against C. and a bill in equity against C. and his grantee to set aside a certain conveyance, in consideration thereof B. guaranteed to A. the full payment, principal and interest, of C.'s debt to A., and also agreed to pay A. the legal expenses and charges which he had incurred, and to assume and pay all legal expenses and costs connected with the proceedings against C. above mentioned; and it was further agreed that B. should have the benefit of the security of A., and that B. should be entitled to an assignment of the security at any time on paying to A. the full amount of his claims against C. and of all disbursements and expenses incurred by him, and upon delivering to him an agreement to indemnify him from all costs and expenses in any way growing out of the legal proceedings above mentioned; and the agreement on A.'s part was made subject to the right of C. to pay the note and require a re-assignment of the security, or of the owners of the equity to pay the mortgage debt. *Held*, in an action by A. against B. on the agreement, that the performance of the guaranty by B. was dependent on the performance by A. of his agreement to assign the security; and that the security was both the mortgage and note given by D. to C.

The waiver of a provision in a written agreement which may be regarded as independent does not affect the mutual and dependent character of other provisions contained in the agreement.

If B., relying upon the security, signs an agreement, guaranteeing to A. the payment of C.'s note, secured by D.'s mortgage and note, A. agreeing to assign the security to B. upon the performance of his undertaking, and if, at the time of signing, D. has been released by A. from his liability upon the note, and B. is ignorant of that fact, and it is not disclosed to him, and subsequently, having discovered it, he declines to pay C.'s note on the ground that D. has been so released, A. cannot maintain an action against him upon the guaranty; and B. is not bound to notify A. that he does not consider himself liable because D. has been released.

The fact that one party to an agreement containing mutual and dependent stipulations has performed a substantive part of his contract, and will suffer loss unless the other party, who has done nothing to mislead him respecting the performance of his contract or to throw him off his guard, is held to his contract, will not justify the court in turning a condition precedent into an independent agreement, and in compelling the latter to resort to his claim for damages either by way of recoupment or action.

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CONTRACT, upon an agreement made by the plaintiff and the defendant on December 1, 1892, which recited that whereas the plaintiff was the holder of a promissory note for the sum of $10,000, made to him by John W. Candler of Brookline, dated February 6, 1887, and payable in three years from its date, and held, as security for the payment of the note, a certain mortgage given to Candler by Oramanda H. Drisko and Jacob Pearson, securing their note of $10,000, dated December 15, 1882, and had brought suit against Candler on his note, which was overdue and unpaid, and attached the property of Candler on the writ, and, at the request of the defendant and for his benefit, had filed a petition in insolvency against Candler, and a bill in equity against him and one David S. Baker, Jr., to set aside a certain conveyance made by Candler to Baker, in consideration thereof the defendant guaranteed to the plaintiff the full payment, principal and interest, of the debt of Candler to him, and also agreed to pay to the plaintiff the amount of his legal expenses and charges theretofore incurred growing out of his claim against Candler, and further agreed to assume and pay all legal expenses and costs in connection with the proceedings against Candler above mentioned, and to save the plaintiff harmless from any payment or expense on account thereof; and it was further agreed that the defendant should have the benefit of the security of the plaintiff, and should assume all risk that the plaintiff's right to avail himself thereof might be lost or impaired by reason of the proceedings against Candler above mentioned; and that, subject to the rights of Candler or those claiming under him, or the mortgagors or of those claiming under them, the defendant should be entitled to an assignment of the security at any time on paying to the plaintiff the full amount, principal and interest, of his claims against Candler and of all the disbursements and expenses incurred by him either by reason of legal proceedings or in the payment of taxes, or in any other way to protect his lien upon the premises, and also upon delivering to the plaintiff an agreement on his part to indemnify and save him harmless from all costs and expenses in any way growing out of the legal proceedings above mentioned, the defendant or those claiming under him giving to the plaintiff seven days written notice requesting such assignment; and the agreement

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on the part of the plaintiff was made subject to the right of Candler or those claiming under him to pay his note and require a reassignment of the security, or of the owners of the equity to pay the mortgage debt. The declaration contained no reference to the indemnity as to future costs and expenses mentioned in the agreement.

The answer alleged that the defendant made the agreement with the plaintiff set forth in the declaration, relying upon the agreement of the plaintiff to transfer to him the note of Drisko and Pearson; that the plaintiff, prior to the making of his agreement with the defendant, had released Drisko from further liability on the note, and had thereby become unable to perform his agreement with the defendant; and that the defendant, in consequence thereof, was released from his liability on the agreement.

Trial in this court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that the plaintiff was a farmer living in Brookline; that in February, 1887, one John W. Candler, also a resident of Brookline, and who was reputed to own considerable real estate both in Norfolk and Suffolk Counties, and to be a person of means, borrowed of the plaintiff the sum of $10,000, and gave therefor his promissory note, and as security for the note indorsed to the plaintiff a mortgage note of A. H. Drisko and Company for $10,000, and assigned to the plaintiff the mortgage securing the note; that in the summer of 1892, the note given by Candler being overdue and unpaid, the plaintiff brought suit thereon and made an attachment of Candler's real estate in Suffolk and Norfolk Counties, which suit was duly entered in court, and was pending, and the attachment had not been discharged, in December, 1892; that the defendant was a resident of Boston, and had been for years a banker and dealer in exchange, and engaged in financial transactions in large amounts; that about December 1, 1892, and prior thereto, he was also a creditor of Candler to a large amount; that just before that date Candler had made a conveyance of all his real estate to one Baker, his son in law, which was dated May 18, 1892, and was recorded June 28, 1892; that the defendant had learned that fact, and believed the conveyance to be a preference which

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was void under the insolvent laws of this Commonwealth, and also believed it to be void as being in fraud of creditors, and feared that the creditors of Candler would be defrauded, unless a petition in insolvency against Candler and a bill in equity to set aside the conveyance were filed at once, but considered that for some reason such proceedings could be had to greater advantage to the creditors on some other claim than his own; that after having inquired and learned of the plaintiff's claim and suit against Candler, the defendant negotiated with the plaintiff's attorney, endeavoring to have the plaintiff institute such proceedings, but the plaintiff refused to do this, preferring to rely on his suit and attachment; that thereupon the defendant proposed to guarantee the payment of the plaintiff's claim if such proceedings were instituted, and the plaintiff agreed to, and at the request of the defendant did, file a petition in insolvency against Candler on December 1, 1896, which alleged that "said mortgage is for the sum of $10,000, but the property covered thereby is not worth more than the sum of $7,000 to the best of your petitioner's knowledge and belief, so that your petitioner has a claim under said first mentioned note for an unsecured balance somewhere in the neighborhood of $3,000," and also on that day, at the request of the defendant, filed a bill in equity against Candler and Baker to set aside the conveyance, and thereupon the defendant and the plaintiff executed the agreement sued on; and that, prior to the execution of such agreement, and before any negotiations between the parties, the plaintiff had received the sum of $400 on the mortgage note of Drisko and Company from Drisko, and on August 1, 1892, in consideration thereof, gave to Drisko an agreement, releasing him from all further liability on the note, which agreement was given with the approval and consent of all parties at that time interested.

The defendant, who was called as a witness by the plaintiff, testified that at the time he made the contract with the plaintiff he relied upon the ability of Drisko to pay the note; that he did not at that time have any information that Drisko had been released, or that any agreement had been made by the plaintiff with him about his liability; and that he did not know how long it was after the agreement with the plaintiff that he first

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learned of the release, but he should say it was "several weeks, possibly." He also testified that he relied on the note.

It also appeared that the plaintiff and the defendant had never met or had any correspondence before the trial; and that all the negotiations were carried on through the plaintiff's attorney, Mr. Carret, who testified that, at the time the agreement in suit was made, he was acting for the plaintiff, and the matter was first brought to his attention on November 28, 1892, by the defendant's attorney; that prior to the signing of the agreement he had talked with the defendant about the matter, and explained to him that the security was not considered good for the amount of the claim, and that they did not look to the Drisko note as good, but looked to the security, and considered that insufficient; that the bill in equity against Baker and the petition in insolvency against Candler were prepared at the request of the defendant or his counsel; that he was acting in association with the defendant's counsel, and had conferences with them about the proceedings; that before the agreement was signed, the defendant came to his office one or more times about this matter, and so had his counsel; that at that time the various notes and papers were in his office with the indorsements on them; that he could not say that the defendant or his counsel saw them or asked to see them, but that there was no difficulty in their seeing them if they had asked to, and the papers were in no way withheld; and that, at the time the agreement was made, he had not in his mind the agreement with Drisko, and made no reference to it, and had at no time previously informed the defendant or his counsel of it.

Mr. Carret also testified that, prior to the making of the agreement of December 1, 1892, the defendant proposed to him a different agreement with regard to this same affair; and the plaintiff's counsel then asked him whether, in that agreement, the question of arrears of interest on the mortgage note was discussed with the defendant. On the defendant's objection, the judge refused to allow this question; and the plaintiff excepted.

There was evidence tending to show a demand upon the defendant, on behalf of the plaintiff, for the payment of the note and performance of the agreement, and a readiness on the part

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of the plaintiff to perform his part of the agreement, and an ability so to do, unless the agreement with Drisko disabled him from so doing. There was no evidence that the defendant had ever made any demand or request for a conveyance or assignment of any of the security described in the agreement sued on, or of any rescission of the contract by the defendant, or of any payment of the plaintiff's expenses. Evidence was offered by the plaintiff as to the legal and other expenses incurred by him in regard to the insolvency and equity proceedings, and under the agreement.

There was no other evidence that the defendant, prior to making the agreement in suit, had any information that Drisko had been discharged from his liability upon the note of O. H. Drisko and Company held by the plaintiff; but there was evidence tending to show that, prior to the bringing of the action, the defendant notified the plaintiff or his attorney that, in consequence of the plaintiff having made an agreement with Drisko discharging him from liability, the defendant did not consider himself liable on the contract.

At the close of the plaintiff's evidence, the defendant's counsel moved that a verdict be directed for the defendant. After hearing arguments on this motion, the judge stated that he should rule, in substance, "that, if the defendant signed this agreement relying upon a note as a part of that security, a note upon which Drisko was a party signing it, and if at the time Drisko had been discharged from his liability upon that note, and the defendant was ignorant of that fact, and it was not disclosed to him at the time of the transaction, and he subsequently, upon discovering that, declined to pay the Candler note on the ground that Drisko had been released from his liability and that the plaintiff could no longer perform that stipulation contained in the agreement, — this plaintiff cannot recover under those circumstances."

He then inquired of the plaintiff's counsel whether, under this ruling, there was any question of fact on which he desired to go to the jury, to which the counsel replied that there were two questions of fact which he considered open under the rulings, and which he desired to have presented to the jury; first, whether the defendant was informed as to the discharge; and secondly,

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whether he entered into the agreement relying upon the note and the signatures to it referred to in the agreement as part of the security. The judge thereupon declined to submit these questions to the jury, and directed them to return a verdict for the defendant; and the plaintiff alleged exceptions.

H. W. Chaplin, for the plaintiff.

R. M. Morse, (*L. Bass, Jr.* with him,) for the defendant.

MORTON, J. The first question is whether the performance of his guaranty by the defendant was dependent on the performance by the plaintiff of his agreement to transfer and assign the security, and we think that it was. Whether stipulations in a contract are dependent, so that neither party can call upon the other to perform unless he is able and willing to perform himself, or whether they are independent, so that the remedy for non-performance is by action only, depends on the sense of the contract as a whole, and the intention of the parties as thus ascertained. *Knight* v. *New England Worsted Co.* 2 Cush. 271, 286. *Howland* v. *Leach*, 11 Pick. 151, 154.

In the present case the defendant guaranteed to the plaintiff the full payment, principal and interest, of what Candler owed him, and he also agreed to pay the plaintiff the legal expenses and charges which he had incurred, and to further assume and pay all legal expenses and costs connected with the petition in insolvency against Candler, and the bill in equity against him and Baker to set aside the conveyance which Candler had made to Baker. The plaintiff agreed that the defendant should have the benefit of the security which he had received from Candler, and that on the defendant's paying to the plaintiff the full amount due him from Candler and all disbursements and expenses, and delivering to him an agreement to save him harmless from all costs and expenses in any way growing out of the legal proceedings referred to above, he would assign to him the security; the agreement on his part being subject, however, to the right of Candler to pay his note and require a reassignment of the security, or of the owners of the equity to pay the mortgage debt. We think that these constitute mutual and dependent agreements. The defendant is not entitled to an assignment of the security until he has paid the claim against Candler and the costs, and given the indemnity provided for, and the plaintiff

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cannot compel the defendant to do this until and unless he is able and ready to assign the security. In other words, performance by one is conditioned upon and subject to performance by the other. This renders the agreements mutual and dependent. *Johnson* v. *Reed*, 9 Mass. 78. *Dana* v. *King*, 2 Pick. 155. *Hunt* v. *Livermore*, 5 Pick. 395. *Cadwell* v. *Blake*, 6 Gray, 402. *Phillips* v. *Soule*, 9 Gray, 233.

The plaintiff appears to have waived the written indemnity as to future costs and expenses. This he could do. But his waiver in regard to that does not affect the mutual and dependent character of other provisions contained in the agreement. Moreover, it is possible for some provisions to be mutual and dependent, and for others in the same agreement to be independent. *Couch* v. *Ingersoll*, 2 Pick. 292. *Kane* v. *Hood*, 13 Pick. 281. *Knight* v. *New England Worsted Co.* 2 Cush. 271. If therefore the provision in regard to future costs and expenses be regarded as independent, those relating to the payment of the Candler note and accrued costs and expenses, and to the assignment of the security, would still be mutual and dependent.

The security referred to is, we think, the mortgage deed and note. As between the original parties, the deed and note were one security. There is nothing to show any separation in dealing with them. The plain implication of the agreement is that Candler assigned both, and that the plaintiff had both. As matter of law, upon payment to the plaintiff of the Candler note, the defendant would have been entitled to the security accompanying it. There is no intention manifested in the agreement to cut down his rights in this respect. On the contrary, they are fully recognized and protected. These considerations derive force from the fact that the agreement provides for the contingency of the payment of the mortgage debt by the owners of the equity. Under the circumstances, therefore, we do not see how the meaning of the word "security" can be restricted to mortgage deeds alone.

At the trial it was uncontroverted that, some months before the agreement was entered into, the plaintiff had released one of the makers of the note. The defendant testified that he did not know this when he signed the agreement, though he was informed of it not very long after; "several weeks, possibly," he

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says. He also testified that he relied on the maker who had been released, and on the note. He did not contend that he was induced to execute the agreement by any fraud or misrepresentation on the part of the plaintiff, but that the failure to communicate the information was due to inadvertence or mistake on the plaintiff's part. On these facts the case presented would be one of mistake in an essential particular regarding the property which was to be assigned to the defendant on his paying to the plaintiff the Candler note and the accrued costs and charges, and the agreement would not therefore be binding on him. *Rice* v. *Dwight Manuf. Co.* 2 Cush. 80. Benjamin on Sales, (6th ed.) §§ 50, 51. In consequence of the release of Drisko, there was no such note in existence as that which was referred to in the agreement, and which the plaintiff was to assign to the defendant. What the result would have been if the defendant had guaranteed the payment of the Drisko note, we need not now consider. See *Veazie* v. *Willis*, 6 Gray, 90; *Jones* v. *Thayer*, 12 Gray, 443.

The plaintiff contends that there was evidence which would have warranted the jury in finding that the defendant knew of the release and that the entire transaction was based on the worthlessness of the mortgage note as personal security, that the defendant should have notified the plaintiff, upon hearing of the release, that he intended to rely upon that fact, and that the defendant, having received a substantial part of the consideration, should perform his guaranty, looking to the plaintiff for such damages either by way of recoupment or action as he has sustained by any particular breach by the plaintiff of his agreement.

We do not think that either one of these contentions is sound.

Mr. Carret testified that, though the notes and papers were in his office, and were not withheld, and the defendant and his counsel were there one or more times in reference to the matter, and could have seen them if they had wanted to, he could not say that they saw them, and "that at the time the agreement was made he had not in his mind the agreement with Drisko, and made no reference to it, and had at no time previously informed the defendant or his counsel of it." He also testified that he told the defendant "that they did not look to the Drisko note as good, but looked to the security, and considered that insufficient."

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There was no testimony to control this, and manifestly it did not show, and had no tendency to show, that the defendant knew of the release before the agreement was signed, or that he regarded the mortgage note as worthless as personal security. Even if we assume that the bill in equity and the petition in insolvency are to be considered in connection with the agreement as forming one transaction, there is no allegation in either that Drisko had been released, or that the mortgage note was worthless as personal security, and it is not shown that the defendant had in fact any knowledge of their contents. Even if he had, it does not follow from the allegation that the security, meaning the land, was not worth more than $7,000, and that there was a balance of about $3,000, that the personal security of the parties to the mortgage note was regarded as worthless. The allegation only means that there was a balance of about $3,000 over and above the security due on the note as against Candler, not that nobody else was liable on the note, or that if there was anybody else liable the security afforded thereby was worthless, and was so regarded.

The plaintiff gave up his attachment on Candler's property, and filed a petition in insolvency against him, and also a bill in equity against him and Baker to set aside the conveyance to the latter. He has performed a substantial part of his agreement, if, indeed, he has not done all that he agreed to do except assign the security. But so far as appears, this was all done before the defendant learned that Drisko had been released. The defendant has not therefore received and accepted performance on the plaintiff's part under such circumstances as to show that he knew or must have known that the plaintiff was unable fully to perform his agreement to assign the security. He has done nothing to mislead the plaintiff respecting the performance of his contract, or to throw him off his guard. The fact that the plaintiff has performed a substantive part of his contract, and will suffer loss, will not justify us in turning a condition precedent into an independent agreement, and in compelling the defendant to resort to his claim for damages either by way of recoupment or action. It must often happen in contracts imposing conditions precedent that, if a party fails to perform, the *status quo* cannot be restored. But parties have a right to make their contracts as they see fit, and in the absence of acts or conduct which would

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render it unjust or unfair for a party to take advantage of a condition precedent, we think that he is entitled to stand on the contract as made. *Wiley* v. *Athol*, 150 Mass. 426. *Norrington* v. *Wright*, 115 U. S. 188. *Bowes* v. *Shand*, 2 App. Cas. 455. *King Philip Mills* v. *Slater*, 12 R. I. 82. If the continued liability of Drisko was a matter of trifling importance, and it was apparent from the agreement that it was so regarded by the parties, it may be that the defendant would not be allowed to defeat the plaintiff by setting up the Drisko release. But we find nothing in the agreement looked at by itself, or in the light of surrounding circumstances, which fairly would justify such a conclusion.

The defendant was not bound to notify the plaintiff that he did not consider himself liable because Drisko had been released. He well might wait till the plaintiff took steps to enforce the guaranty. Even if the defendant were bound to give such notice, there is nothing to show that for want of notice the plaintiff did anything which he would not have done, or failed to do anything which he would have done. The doctrine of waiver or estoppel does not therefore apply. The plaintiff has not argued the exception as to the admission of testimony, and we therefore treat it as waived. *Exceptions overruled.*

JACOB L. WILLIAMS *vs.* COMMONWEALTH.

Suffolk. January 15, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Eminent Domain — Damages — Improvements by Life Tenant.

When real estate has been taken under the right of eminent domain, damages will not be allowed either for improvements made by a life tenant for the convenience of his business, so far as they constitute a part of the real estate, or come within the description of fixtures, or for the injury caused to such improvements, so far as they are personal property, or for the loss of their use in his business.

PETITION, for the assessment of damages for the loss of improvements made by the petitioner, a life tenant, upon real

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estate which had been taken by the State House Construction Commissioners under the right of eminent domain. The petition alleged that the petitioner was the life tenant of certain premises on Mount Vernon Street, in Boston, which had been taken by the State House Construction Commissioners under the authority of St. 1894, c. 532; that the petitioner had at various times made improvements on the premises, which were necessary and convenient for him in his profession, of which by such taking he had been deprived. The prayer of the petition was that damages for such improvements might be assessed and paid separately to the petitioner. Annexed to the petition was a list of the improvements made by the petitioner, with the cost thereof, as follows.

1867. April 10.	Barker & Co., carpenters, special arrangements for laboratory . .	$1,043.90
Aug. 15.	Fuller, for bells and tubes . . .	59.55
Dec. 14.	Clark, door lights for offices . . .	17.62
Nov. 1.	Barker, outside windows for offices	12.00
1873. Sept. 16.	Bennett, builder, for west bay window for an office	427.37
July & Nov.	Marsh, mason work for office . .	103.00
Dec. 31.	Office, heating pipes, etc., Chubbuck	80.75
1882. Aug. 4.	Spurr, permanent finish for entrance and offices	268.00
1883. Sept. 5.	Glass panels in office, West Glass Vender Co.	6.17
1885. Dec. 17.	South bay office window, total . .	676.42
1887. Sept. 1.	Chubbuck, large furnace for heating offices	183.24
		$2,878.02

The case was submitted to the Superior Court, and, after judgment for the respondent, to this court, on appeal, upon agreed facts, in substance as follows.

The petitioner had, at various times between 1867 and 1887, fitted up certain rooms in the premises which were taken with various appliances, such as bells, tubes, pipes, and other fixtures, which it was agreed at the time of the taking were of the value of eighteen hundred dollars; that on July 17, 1894, the premises

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were taken by the State House Construction Commissioners, who by agreement with the remainderman paid to him, with the assent of the petitioner, a sum representing the market value of the estate, but which did not include any special damage occasioned to the petitioner for the loss of his fixtures.

If the petitioner was entitled to recover for the loss of his fixtures and appliances, judgment was to be entered in his favor for the sum of eighteen hundred dollars; otherwise, judgment was to be entered for the respondent.

J. C. Ropes & L. M. Friedman, for the petitioner.

W. D. Turner, for the Commonwealth.

MORTON, J. The character of the improvements does not appear very clearly from the petition, or from the agreed facts. Some things which the petitioner did, the putting in of the bay windows, for instance, must have constituted a part of the realty, and as such must have been included in the market value, though it is agreed that they did not enhance it. To allow the petitioner damages, therefore, on account of them, would be compelling the Commonwealth to pay twice, which no construction of Pub. Sts. c. 49, § 27, on which the petitioner relies, would justify. So far as the improvements come within the description of fixtures, they also, as between the Commonwealth and the parties owning or interested in the land and building, must be regarded, till severance at least, as part of the real estate. *Edmands* v. *Boston*, 108 Mass. 535, 549. *Allen* v. *Boston*, 137 Mass. 319. Lewis, Eminent Domain, § 488.

There is nothing to show that they have been severed, or that they were not included in the taking. If they were included in the taking, then, of necessity, they must form a part of the market value of the land and building taken, and the petitioner gets all that he is justly entitled to, under the statutes or otherwise, when he receives the income of property whose value has been arrived at by taking them into account, though they may not have been regarded as enhancing it. So far as they consist of personal property, damages are not to be assessed for losses occurring in respect to them in consequence of the taking. *Edmands* v. *Boston*, *ubi supra*. We do not find it necessary to determine the meaning of the phrase "Damage special to a separate estate therein," in Pub. Sts. c. 49, § 27.

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The fact that the premises as the petitioner had fitted them up were convenient for his business, and that he will lose the use in his business of the conveniences which he had thus provided, cannot be regarded as an element of damage, any more than the loss of good will would be. *Edmands* v. *Boston*, 108 Mass. 535. *Maynard* v. *Northampton*, 157 Mass. 218.

As the case stands, we think that the judgment should be affirmed, and it is *So ordered.*

JOSEPH J. REDMUND *vs.* PAUL BUTLER & another, executors.

Middlesex. January 19, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Master and Servant — Obvious Risk — Law and Fact.

At the trial of an action for personal injuries received by the plaintiff while in the employ of the defendant, there was evidence tending to show that the plaintiff, who had been employed for three or four months prior to the accident in moulding lead, was set to work melting dross, and that while pouring damp dross into a kettle of molten lead the kettle exploded and injured him. There was testimony on the part of the defendant that the plaintiff had been warned of the danger arising from the contact of dampness with molten lead, but the plaintiff denied that he had ever received any such warning. There was also testimony that the plaintiff had been instructed by another workman to pour the dross slowly from the kegs where it was stored into a box, and from the box into the kettle, and to spread his hands out over the dross as it was running from one receptacle into the other, instead of which the plaintiff poured the dross from the box at the moment of the explosion all at once, in a lump, and not slowly. This was not contradicted by the plaintiff, who did not testify in denial of the instructions as to pouring slowly and spreading his hands over the dross, but testified that he poured the dross in the manner he was instructed to. *Held*, that the risk was not of a character so obvious that the plaintiff must be taken to have assumed it; and that there was evidence in the case which the judge erroneously withdrew from the consideration of the jury.

TORT, for personal injuries occasioned to the plaintiff while in the employ of the defendants' testator, in consequence of the explosion of a kettle of molten lead.

At the trial in the Superior Court, before *Lilley*, J., there was evidence tending to show that the defendants' testator was a manufacturer of cartridges, and that he had in his employ one

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Dimon, who had general charge and supervision of the work, and one Wells, who, as a subordinate employee, was properly intrusted by Dimon with the duty of seeing that the work was safely and properly performed; that the plaintiff had, for three or four months preceding the accident, been employed by the defendants' testator in melting lead, and dipping it out of a kettle while molten and pouring it into moulds; that on the morning when the accident occurred Wells instructed Pyne, the senior workman in the moulding room, to set the plaintiff at work melting dross; that, while so employed, the process used by the plaintiff was to pour the dross from kegs where it had been stored into a box from which, standing on a raised platform beside the kettle of molten lead, he emptied the box into the kettle; that after he had been so employed for about three hours he undertook to pour a box of dross into the kettle which was then partly filled with molten lead; that both the dross and the box from which it was poured were damp, and the contact of the dampness with the molten lead caused an explosion, by which the plaintiff sustained the injuries complained of. There was also evidence tending to show that by the contact of water or dampness with molten lead steam is quickly generated, and causes an explosion; and that, although the plaintiff had ample opportunity to examine the contents of the kegs and ascertain their condition, it did not appear that he did so; but there was also evidence that no dross had previously been melted during the period of the plaintiff's employment, and the plaintiff himself testified that he had received no warning as to the danger of allowing a contact of dampness and molten lead.

Pyne testified, for the defendants, that he instructed the plaintiff to pour the dross slowly from the kegs into the box, and from the box into the kettle, and in such case to spread his hands out over the dross as it was running from one receptacle into the other, and that he warned the plaintiff of the danger arising from the contact of water and molten lead, and instructed him to ascertain whether there was water or dampness about the dross.

The defendants also introduced evidence tending to show that the plaintiff poured the dross from the box at the moment of the explosion all at once, in a lump, and not slowly. This was not

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contradicted by the plaintiff, nor did he testify in denial of Pyne with reference to the instructions as to pouring slowly, and spreading his hands over the dross, but he denied that any warning whatever was evér given him, and testified that he poured the dross in the manner he was instructed to.

At the close of the evidence, the judge ruled that the action could not be maintained, and directed the jury to return a verdict for the defendants; and the plaintiff alleged exceptions.

P. J. Doherty & A. E. Burr, for the plaintiff.

J. C. Burke, for the defendants.

MORTON, J. Though the plaintiff had been at work for the defendants' testator three or four months before the accident in the same room where he was injured, it does not appear that he had been set at any time to melting dross, or that his attention had been called by anything which had happened to anybody else to the danger of putting damp lead into molten lead; and we cannot say that the risk arising from doing so was of such an obvious character and so well known that he must be held to have known of and understood it, and therefore to have assumed it. There was testimony on the part of the defendants that the plaintiff had been warned of the danger likely to arise from anything damp coming in contact with molten lead. The plaintiff, however, denied that he had ever received any such warning. On this point, therefore, there was evidence for the jury.

There was testimony from one Pyne, who was the senior workman in the room where the plaintiff was working, and who had been directed to set the plaintiff at work melting dross, "that he instructed the plaintiff to pour the dross slowly from the kegs into the box, and from the box into the kettle, and in such case to spread his hands out over the dross as it was running from one receptacle into the other." And the defendants introduced evidence tending to show that, instead of doing this, "the plaintiff poured the dross from the box at the moment of the explosion all at once, in a lump, and not slowly." "This," the exceptions state, "was not contradicted by the plaintiff, nor did he testify in denial of Pyne with reference to the instructions as to pouring slowly, and spreading his hands over the dross, but he denied that any warning whatever was ever given him, and testified that he poured the dross in the manner he was in-

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structed to." This might have been taken to mean, either that he poured the dross as Pyne testified that he told him to, and as importing a denial therefore that he poured it all at once, or that Pyne told him to pour it all at once, and he did so, or that, whatever the instructions were as to the manner of pouring, he followed them. The jury might also have found, as the fair result of the testimony, that Pyne told him to pour as he said he did, but that the plaintiff poured it "all at once, in a lump," in which case we do not think that he would have been entitled to recover. Apparently this was the view taken by the judge who tried the case. But we cannot say that the jury might not have taken one of the other views which we have indicated, and if they did we cannot say that there was not evidence of negligence on the part of the defendants' testator and of those standing in his place in furnishing him with damp dross to be put into the kettle of molten lead, and in failing to warn him of the danger to be expected therefrom.

We think, therefore, that the exceptions must be sustained, and it is so ordered. *Exceptions sustained.*

CHARLES J. GROVES *vs.* JOSEPH S. WILSON & another.

Suffolk. March 3, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Liability as General or Special Partner — Statute.

A partnership composed of A., B., and C., under the name of A., B., and Company, was dissolved, and a limited partnership under the same name was formed, A. being named as special partner, and B. and C. as general partners. The provisions of law relating to limited partnerships were complied with, and the new firm succeeded to the business of the old. *Held*, in an action against A. on a promissory note given by B. in the firm's name, without the knowledge of A. or C., that by Pub. Sts. c. 75, as modified by St. 1887, c. 248, the name of A. could form part of the name of the limited partnership without making him liable as a general partner.

CONTRACT, upon a promissory note. The plaintiff, who was the holder thereof in good faith and for value, attempted to hold

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the defendant Wilson, who was the special partner in a limited partnership, as a general partner, for failure to comply with the statutes exempting him from general liability. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows.

For some time before June 10, 1887, the defendant Wilson, and one Cassells and one Hareson, were general copartners under the name of Wilson, Cassells, and Company, having their place of business in Boston when the firm was dissolved, and the same parties formed a limited partnership under the same name. Cassells and Hareson were named in the articles of copartnership as general partners, and the defendant Wilson as special partner; their place of business remained as before, and the sign over it was the same as had heretofore been used under their general copartnership. The new firm succeeded to the business of the former one, having the consent of all the members of the firm thereto, if said members were legally able to give such consent. All the provisions of the statutes relating to limited partnerships were duly complied with, unless the facts above set forth show a failure so to comply.

The partnership having become unsuccessful in business, Cassells, without the consent and knowledge of the other partners, borrowed four hundred dollars of one Stetson, and gave a promissory note therefor signed Wilson, Cassells, and Company, and then used the funds for his own personal purposes.

If the defendant Wilson at the time of giving the note was liable as a general partner for the amount thereof in the firm of Wilson, Cassells, and Company, judgment was to be entered against him for the amount of the note and interest; otherwise, the judgment for him was to be affirmed.

S. L. Whipple, for the defendant Wilson.

F. S. Hesseltine, (*R. R. Gilman* with him,) for the plaintiff.

BARKER, J. Limited partnerships are regulated in this Commonwealth by the provisions of Pub. Sts. c. 75, and of St. 1887, c. 248. By a clause of Pub. Sts. c. 75, § 3, if the name of a special partner was used in the firm name, he was made liable as a general partner, unless the name of the special partner so used was his surname, and was also the surname of a

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general partner. But the limited partnership in which the defendant Wilson was a special partner, and in the name of which his surname appeared, was formed after the passage of St. 1887, c. 248, the first section of which allows such a partnership which succeeds to the business of a former firm to adopt and use the name of such firm, instead of the name prescribed by Pub. Sts. c. 75, § 3, with the consent of the members of the former firm, which consent was given in the present case.

The plaintiff contends that, while the later statute made it lawful for the new firm to have the name of the old, yet the provision of the former statute making the special partner whose name appeared in the name of the limited partnership liable as a general partner was not specifically repealed, and makes the defendant Wilson liable as a general partner.

The language of St. 1887, c. 248, is general, and includes the case of a limited partnership formed to succeed to the business of a former firm, where the same persons compose the two firms, and one or more of them become special partners in the new firm. We must take this permission of St. 1887, c. 248, § 1, with the fourth section of the same statute, amending Pub. Sts. c. 75, § 12, as to the liability of special partners, and with the fifth section repealing so much of Pub. Sts. c. 75, as is inconsistent with St. 1887, c. 248. The result is, that when the use of the name of a special partner in the name of a limited partnership is authorized by St. 1887, c. 248, § 1, there is a plain implication in the fourth section of that statute that the special partner is not liable as a general partner. This implication is to be given effect by holding that the provisions of Pub. Sts. c. 75, § 3, are in that respect modified by the later statute, the repeal extending to such cases, but leaving the provision of Pub. Sts. c. 75, § 3, to operate in cases where the use in the name of the limited partnership of the name of a special partner is not authorized by the two statutes construed together.

Judgment affirmed.

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JAMES D. THOMSON *vs.* ORSINO G. SLEEPER.

Suffolk. March 3, 4, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Alias Execution — Mandamus to require Execution to issue.

When one of two judgment debtors, having been arrested on execution, enters into a recognizance, and then makes default, an alias execution, reciting the joint judgment, may, upon the return of the original execution, issue against the person and property of the other judgment debtor.

When it appears of record that one of two judgment debtors has been arrested on execution, and, having entered into a recognizance, has made default, mandamus will lie to the clerk of the court issuing the execution upon his refusal to issue an alias execution against the person and property of the other judgment debtor.

PETITION, filed December 17, 1896, for a writ of mandamus to issue to the respondent, as clerk of the Municipal Court of the city of Boston, requiring him to issue an alias execution on a judgment rendered by that court.

The petition alleged that on October 2, 1895, the petitioner recovered judgment in the Municipal Court of the city of Boston against Alfred A. Marcus and Simeon Marcus, copartners; that, upon an execution duly issued thereon, Simeon Marcus was arrested and entered into a recognizance in accordance with the statutes for the relief of poor debtors, and that subsequently said Simeon made default on his recognizance, all of which matters and things by the record thereof now remaining in said court will more fully and at large appear; and that, after the return of the original execution and the default of Simeon Marcus on his recognizance, the petitioner applied for another execution wherewith to arrest the said Alfred or levy on his estate, but that the respondent refused to issue it.

The prayer of the petition was for a command to issue to the respondent requiring him to issue another execution.

The respondent, in his answer, conceding that the facts alleged in the petition appeared of record in the Municipal Court, alleged his belief that such facts were a bar to the issuing of another execution, and submitted himself to the judgment of the court.

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Hearing before *Holmes*, J., who entered a decree directing the respondent to issue another execution, subject however to a stay on said execution as to Simeon Marcus, so far as cause may be shown for such stay. To this decree the respondent excepted, and, at his request, the judge reported the case for the consideration of the full court. If the decree was correct it was to stand, and the order was to issue; otherwise, such order was to be made as this court should direct.

P. A. Bridgham, for the respondent.

J. D. Thomson, pro se.

FIELD, C. J. If the judgment had been rendered against Simeon Marcus as sole defendant, then, upon his being arrested and giving a recognizance in accordance with the statutes for the relief of poor debtors, several things might have happened which the judgment creditor could not prevent, and to which his consent was not necessary. The debtor might have been examined and the oath for the relief of poor debtors administered to him. Upon taking this oath the debtor would become forever exempt from arrest on the same execution, or on any process founded on the judgment or on the same cause of action, unless convicted of having sworn falsely on his examination, but the creditor could take out a new execution against his goods and estate, as if he had not been committed. Pub. Sts. c. 162. *Cheney* v. *Whitely*, 9 Cush. 289. If on examination the oath is refused, a certificate to that effect must be annexed to the execution, and then the debtor may be rearrested on the same execution if the officer is present at the place of examination when the oath is refused. Pub. Sts. c. 162, § 44. *Ruberg, petitioner*, 166 Mass. 33.

If the debtor, after having entered into a recognizance, makes default, then the only remedy of the creditor is upon the recognizance, and the creditor cannot further enforce the collection of the execution. *Coburn* v. *Palmer*, 10 Cush. 273. *Whitton* v. *Bicknell*, 3 Allen, 472. *Morgan* v. *Curley*, 142 Mass. 107. But the judgment is not satisfied by arresting a defendant and discharging him from arrest on his entering into a poor debtor recognizance. *Tracy* v. *Preble*, 117 Mass. 4. In the present case, Simeon Marcus, having been arrested and having entered into a recognizance, made default, and, although the judgment

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is not discharged, neither his person nor his property could be taken on an execution issued on the judgment. The question then is, whether execution should issue against Alfred A. Marcus and Simeon Marcus jointly, or only against Alfred A. Marcus. The arrest of one of two joint judgment debtors does not suspend the right of the judgment creditor to take on execution the person of the other defendant or his property.

In *Kellogg* v. *Underwood*, 163 Mass. 214, where one of four judgment debtors was arrested on execution and entered into a poor debtor's recognizance, and subsequently another of the judgment debtors was arrested on an alias execution and committed to jail and claimed support as a pauper, and, the judgment creditor declining to pay for such support, the prisoner was discharged under Pub. Sts. c. 162, §§ 45 and 46, whereby under § 47 the debt and costs remained a legal claim against his goods and estate, but his body was no longer liable to arrest or imprisonment, the court say: "The effect of these provisions is to leave the judgment in full force, except that no execution can be issued under it for the arrest of the body of a defendant who has been so discharged. Execution may be issued against his property, or against the person or property of a co-defendant, and proceedings may be had under it against the property of any defendant, and against the body of any defendant except him who has been discharged from arrest, with the same force and effect as if no arrest had ever been made." *Cheney* v. *Whitely*, 9 Cush. 289. *Raymond* v. *Butterworth*, 139 Mass. 471. See Freem. Ex. (2d ed.) § 462; *Nadin* v. *Battie*, 5 East, 147; *Blofield's case*, 2 Cro. Eliz. 178; *Whiteacres* v. *Hamkinson*, Cro. Car. 75; *Foster* v. *Jackson*, Hob. 52.

In the present case the judgment creditor is entitled to an alias execution against the person and property of Alfred A. Marcus. Shall the execution be issued against Alfred A. Marcus alone, or against him and Simeon Marcus jointly, with a stay of execution against Simeon Marcus indorsed on it? We think that the better practice is to issue an execution against Alfred A. Marcus only. By the proceedings against Simeon, the judgment for the purpose of enforcing it by execution has been severed. The judgment creditor has his remedy against Simeon by suit on the recognizance, and his remedy against Alfred A. by taking

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either his person or property on execution. It is generally true that the execution must follow the judgment, and that if the judgment be joint so must be the execution. See *Clarke* v. *Clement*, 6 T. R. 525; *Linn* v. *Hamilton*, 5 Vroom, 305. But where, by proceedings subsequent to the judgment, the right of the judgment creditor to enforce an execution against the person or property of one of two or more defendants has been lost, we think that it is within the power of the court so to find, and to issue execution only against those liable to execution. Pub. Sts. c. 171, §§ 20, 21. *Raynes* v. *Jones*, 9 M. & W. 104. *Saunders* v. *Gallagher*, 2 Humph. 445.

This is a petition for a writ of mandamus against the clerk of the Municipal Court of the city of Boston, and it prays that said clerk be commanded to issue another execution "wherewith to arrest the said Alfred or levy on his estate." The petition recites the proceedings against Simeon, his arrest, his entering into a recognizance, and his subsequent default, and it is averred that "all of which matters and things, by the record thereof now remaining in said court, will more fully and at large appear." A transcript of the record is not before us. The return of an officer who has served an execution by an arrest of the person does not necessarily show that the debtor whom he has arrested has made default under his recognizance; that is a fact which might not be of record in the court from which the execution issued. It is generally true that the duty of the clerk to issue an execution on a judgment is a ministerial duty which he may be compelled to perform by mandamus, and for the non-performance or illegal performance of which he is liable to an action. *Pease* v. *Morris*, 138 Mass. 72. *Fisher* v. *Deans*, 107 Mass. 118. *Sullivan* v. *Jones*, 2 Gray, 570. *Blanchard* v. *Waters*, 10 Met. 185. *Briggs* v. *Wardwell*, 10 Mass. 356.

But when the right of the judgment creditor to execution has been modified by something which has occurred after judgment, and when facts must be found which are not of record in order to determine how far this right has been modified, it is the province of the court to find these facts, enter them upon the record, and determine their effect upon the rights of the judgment creditor. In the present case, the clerk, if he had issued an execution in common form against both defendants jointly, could not, with-

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out a general or special order of the court, indorse on it a stay of execution as against Simeon Marcus, nor could he, unless the facts which justified it appeared of record, without a general or special order issue an execution against Alfred A. Marcus only.

If the facts recited in the present petition did not appear on record, the petitioner before bringing his petition should have applied to a justice of the Municipal Court for the proper findings, and a direction to the clerk to issue a separate execution against the person and property of Alfred A. Marcus, in which however the recovery of a joint judgment properly should be recited. If, the justice having made his findings and entered them upon the record, the clerk refused to issue an execution such as should be issued, mandamus would then lie. But as in the present case it is conceded that the facts alleged in the petition appear of record in the Municipal Court, a writ of mandamus may issue, commanding the clerk to issue an alias execution against the person and property of Alfred A. Marcus only. The execution should recite that the judgment was recovered against both Alfred A. Marcus and Simeon Marcus.

Ordered accordingly.

LYDIA W. HARMON *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. March 4, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Personal Injuries — Market Value of Services — Evidence — Exceptions — Instructions — Damages.

Where, in an action for personal injuries, the only ground relied on in support of the exceptions was that it was not competent for the plaintiff to show what his services would be worth in the market to other persons, the court said that, while upon reading the bill of exceptions, it was hardly to be supposed that this question was presented or ruled on at the trial, yet, if it was, the evidence was competent.

In an action for personal injuries, the instructions of the judge as to the rule of damages not being stated in the bill of exceptions, and no exception being taken to them, the court said that, if the plaintiff's services had a market value in the kind of business in which he was engaged, such market value might be proved

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to the jury as a fact which they might take into consideration in determining the amount of damages to be awarded to him, although he had not actually worked for others, but was engaged in business on his own account.

TORT, for personal injuries occasioned to the plaintiff, on February 29, 1892, while upon a train on the defendant's railroad. Trial in the Superior Court, before *Fessenden*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified, on direct examination, that before the accident she had had experience in keeping restaurants and boarding houses in Boston, having had the whole charge of three houses connected as one; that she began thirty years before, and had been in the business up to within seven or eight years before the accident; that she was engaged at the time of the accident in keeping a restaurant at 52 North Market Street, in Boston; and that there was a market value for such services as hers, and that she knew what it was.

On cross examination, she said she had never herself received wages for her services, and had never hired anybody to take care of a restaurant and lodging house as she did, and paid them by the week or month for it; and in answer to the questions, "Had you ever been hired out to anybody to do this sort of work like this business you had? Did you get wages by the week or the month or the day, or any other way?" she replied, "I had been engaged to go."

This was all the evidence on her qualification to testify.

She was then asked, in direct examination, "What was the fair market value of your services at the time of this accident?"

The judge admitted the question, subject to the defendant's exception. The witness answered, "Twenty-five dollars a week to other people."

Mary J. Stimson, called by the plaintiff, testified that she had kept a boarding and lodging house in Boston for twenty years, and had known the plaintiff for twenty-eight or thirty years, although for the last few years she had seen very little of her; that she considered the plaintiff a very capable woman; that she had had the reputation of being the finest cook in Lewiston, Maine; that she was very capable in managing a boarding house, and the help and boarders; and that she knew the market value of services of such a woman as she knew the plaintiff to be.

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She was then asked, "What was the fair market value of the services of a woman of Mrs. Harmon's age and capacity at the time of this injury, in 1892?"

The defendant's counsel having objected to the substance of the question, the judge gave him an opportunity to cross-examine the witness upon her qualification to testify, but the counsel stated that he preferred to cross-examine later. The judge permitted the question to be put, and the defendant excepted.

The witness answered, "I should say $25 or $30 a week."

On general cross-examination, in answer to the question, "What do you understand by market value?" the witness said: "I don't know as I understand your question hardly, — market value: the way I take the question here, services in the house, or what she is worth in a business way. . . . I consider my services something, and yet I don't think they are anything compared to hers, — what hers used to be in running a house or a saloon."

"*Q.* What is the market value of a house? *A.* What you can make out of it. If you are not capable of running it, you can't make anything out of it.

"*Q.* No; I mean a piece of real estate independent of anybody to run it. *A.* I don't think I understand your question at all. I have answered it the best I could, but the market value of anything is what you make of it, is n't it, and what you can get out of it?

"*Q.* Is that your idea? *A.* It is; I think if you take a house and you are not capable of running it, and don't make anything out of it, it is not worth anything; and if you take it and make a success, it is what I should call the market value.

"*Q.* Then your idea of market value is the result? *A.* Is the capability that you have of running a place and taking care of it.

"*Q.* That is your idea of market value? *A.* That is the nearest I can come to it.

"*Q.* That is what you mean by your testimony when you talk about the market value of Mrs. Harmon's services, is n't it? *A.* It is; that is what I mean."

At the end of the cross-examination, counsel for the defendant asked that this witness's testimony be stricken out.

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The plaintiff's counsel then asked the witness:

"Mrs. Stimson, will you disassociate any idea of Mrs. Harmon and her services from your mind, and answer this question to me: What, if I inquire of you the market value of something, whether it is the bag you have in your hand, or the gloves that you have on your hands, or potatoes in the market, or meat, or what not, what do you understand by those words 'market value'? does that convey something to your mind? *A.* Why, all it conveys to my mind, the market value of anything is what it will fetch."

The witness was further asked:

"Mrs. Stimson, when you are testifying as to the value of Mrs. Harmon's services, whether or not you have in mind the sum which they will fetch in the market, — whether or not you have that in your mind when you testify to their value?"

The defendant objected.

"*Q.* Or what her services would command in the labor market? *A.* Why, the question was asked me what they would command, and I said —

"*Q.* No, no. Do you have that element in your mind of what they will bring? *A.* Why, yes, I do; what they would bring; what my own would or Mrs. Harmon's."

The judge allowed the evidence to stand, and the defendant excepted.

Eugene Fellner, called by the plaintiff, having testified that he was twenty-eight years old, was engaged in the restaurant business in Boston, and had had for several years the whole charge of the three Fellner restaurants in Boston, employing all the help, and managing the entire business, and that he knew the market value of the services of a person who was capable of managing a restaurant, was then asked the following question:

"Assuming that a woman is fifty-one years of age, that she has been engaged practically in keeping a restaurant and a boarding house for twenty-five years, with perhaps some slight intervals, — but for the most part of the time for twenty-five years, — and that she has kept such restaurants and boarding houses here in Boston, on Columbus Avenue and at 52 South Market Street; and assuming further that she is a woman who has the physical and mental capacity to manage and control a restaurant where there are from two hundred to four hundred

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patrons that take their meals in a day, and three boarding houses where there are from eighty to one hundred people; assuming that she is a first-class cook, that she understands pastry cooking and meat cooking, and that furthermore she has the capacity to take charge of help, both in the hiring and the managing of the help necessary to a restaurant or a boarding house; assuming further that she is a person of tact and pleasant disposition, so that she has the good will of a large number of patrons; — I wish you to state to the jury what the services of such a person, what the fair market value of the services of such a person as I have described would be?"

There was evidence from which the jury would be authorized in finding that the particulars stated in this question were true.

To the substance of this question, the defendant objected.

The judge allowed it to be put, and the defendant excepted.

The witness answered, "I should say that they would be worth about $60 a week."

The jury found for the plaintiff; and the defendant alleged exceptions.

C. F. Choate, Jr., for the defendant.

A. A. Strout & G. E. Smith, for the plaintiff.

ALLEN, J. The only ground relied on in support of the exceptions is that it was not competent for the plaintiff to show what her services would have been worth in the market to other persons. Upon reading the bill of exceptions we should hardly suppose that this question was presented or ruled on at the trial; but, if it was, we are of opinion that the evidence was competent. The instructions of the court as to the rule of damages are not stated, and no exception was taken to them. But if the plaintiff's services had a market value, in the kind of business in which she was engaged, such market value might be proved to the jury as a fact which they might take into consideration in determining the amount of damages to be awarded to her, although she had not actually worked for others, but was engaged in business on her own account. See *Matteson* v. *New York Central Railroad*, 35 N. Y. 487, 493.

Exceptions overruled.

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HANNAH N. RAYMOND *vs.* CITY OF HAVERHILL.

Essex. March 12, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Personal Injuries — Liability of Municipal Corporation for Consequential Damages resulting from Injuries sustained through a Defective Public Way.

In an action against a municipal corporation, under Pub. Sts. c. 52, § 18, for injuries received in consequence of a defect in a public way, the defendant is liable in damages only for the direct and immediate results of the injury, and not for the results of a subsequent injury occasioned by the voluntary act of the plaintiff, which was not induced by any necessity caused by his previous injury.

TORT, for personal injuries occasioned to the plaintiff in consequence of a defect in a public way in the city of Haverhill.

Trial in the Superior Court, before *Sherman*, J., who, after a verdict for the plaintiff, at the request of the defendant, reported the case for the determination of this court, in substance as follows.

The plaintiff introduced evidence tending to show that, on June 18, 1894, while travelling on a street in the defendant city, and while in the exercise of due care, she fell and received injuries in consequence of a defect in the sidewalk; that thereafter by reason of the injury, her right ankle was weakened and disabled so that at times it was likely to turn and to fail to support her; that on October 9, 1894, while assisting to prepare for an entertainment in a public hall, she undertook to step from a chair on which she was standing to a settee, and, while so in the act of stepping, her right ankle, as her left foot was raised, failed to support her; and that she fell and fractured her leg. On cross-examination, she testified that she was aware that the weak foot was liable to give way, but that she was willing to take her chances as it was the only foot she had to step on.

The defendant requested the judge to rule that the plaintiff was not entitled to recover for the injuries which she sustained by reason of the fall in the hall, but the judge declined so to rule, and instructed the jury that if the plaintiff, when she fell in the hall, was in the exercise of due care, and if that fall

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was the natural result of the weak and disabled condition of her ankle caused by the fall on the sidewalk, then, if she was entitled to recover for the injuries sustained by reason of the fall on the sidewalk, she would also be entitled to recover for the injuries sustained by her in the hall.

The judge submitted the following questions to the jury:

"1, What are the damages on account of the injury received June 18, 1894?

"2. What are the damages on account of the injuries received June 18, 1894, and October 9, 1894?"

The jury were instructed, in answering the first question, to take into account and allow for all the pain, suffering, inconvenience, and disability, present or future, which they should find that the plaintiff had suffered or would suffer by reason of the injury received on the sidewalk, but not to consider as an element of damages the injury received in the hall; and they were further instructed not to answer the second question unless they found that the plaintiff was in the exercise of due care when she fell in the hall. To the first question the jury answered, $500; and to the second, $800.

If the plaintiff was entitled to recover damages for the injuries sustained in the hall, judgment was to be entered for the larger sum; otherwise, for the smaller sum.

B. B. Jones & M. A. Pingree, for the defendant.

W. H. Moody & H. E. Bartlett, (*J. H. Pearl* with them,) for the plaintiff.

FIELD, C. J. A majority of the court are of opinion that judgment should be entered for the smaller sum. In actions under Pub. Sts. c. 52, § 18, against towns and cities for injuries received in consequence of defects in public ways, the towns and cities are liable in damages only for the direct and immediate results of the injury. *Harwood* v. *Lowell*, 4 Cush. 310. *Marble* v. *Worcester*, 4 Gray, 395. *Jenks* v. *Wilbraham*, 11 Gray, 142.

The damage received by the plaintiff from undertaking to step from the chair to the settee on October 9, 1894, when her right ankle failed to support her and she fell, is not a direct and immediate result of the accident which happened on June 18, 1894. On October 9, 1894, she was not acting from any necessity caused by her previous injury, but acting independently and voluntarily,

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and as a result of her voluntary conduct she was again injured. A new and independent cause intervened between the original injury and the injury she received on October 9. We do not mean to intimate that, if this were an action of tort for negligence at common law, and not under statutes, the injury received on October 9 could be considered as the natural and proximate result of the injury received on June 18. See *Scheffer* v. *Washington City, Virginia Midland, & Great Southern Railroad*, 105 U. S. 249. *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469.

The only decisions opposed to the view we have taken which have been shown us are *Wieting* v. *Millston*, 77 Wis. 523, and *Brown* v. *Chicago, Milwaukee, & St. Paul Railway*, 54 Wis. 342. It is possible to distinguish *Brown* v. *Chicago, Milwaukee, & St. Paul Railway*. *Wieting* v. *Millston* clearly supports the instructions of the presiding justice in the present case, but we are not satisfied with that decision.

By the terms of the report, the verdict must be set aside, and judgment entered for the sum of five hundred dollars.

So ordered.

NORMAN Y. BRINTNALL *vs.* CHESTER H. GRAVES.

Suffolk. March 12, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Settlement of Title — Undischarged Mortgage — Acts in Recognition of the Mortgage.

A petition, under St. 1882, c. 237, to relieve real estate of the encumbrance of an undischarged mortgage cannot be maintained where, within twenty years after the time therein limited for the performance of its conditions, the mortgagor recognizes the existence of the mortgage by a letter written to the mortgagee referring to the mortgage debt and promising payment thereof in time, and later, by buying back from his assignees in bankruptcy the equity of redemption in the mortgaged real estate.

PETITION, filed June 1, 1896, under St. 1882, c. 237, to free the record title to real estate from the encumbrance of an undischarged mortgage.

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The petition alleged that, on June 3, 1872, the petitioner, by a deed of mortgage, conveyed to the respondent a parcel of land in Charlestown, subject to redemption upon the payment of sixteen hundred dollars to the respondent in one year with interest at six per cent per annum; that the petitioner, or those having his estate in the premises, had been in uninterrupted possession of the mortgaged premises for more than twenty years after the expiration of the time limited in the mortgage for the performance of the conditions thereof, to wit, June 3, 1873; that no claim or demand had ever been made by the respondent, or by any person claiming under the mortgage, of any right or interest in the mortgaged premises, or to any payment of principal or interest under the mortgage; that no payment on the mortgage had been made, or any act done in recognition of its existence as a valid mortgage, within twenty years after the expiration of the time limited in it for the performance of the conditions thereof; that nothing was due under the mortgage, but that the record title of the premises subject thereto was encumbered because the mortgage remained undischarged of record, and that the respondent refused to discharge it.

The prayer of the petition was that the respondent and all persons claiming under him, or under the mortgage, and that all other persons should be perpetually enjoined from asserting any claim under the mortgage, or from bringing any action to enforce a title thereunder.

The case was referred to a master, who found that the mortgage was given to secure payment of a note for sixteen hundred dollars, payable to the respondent in one year, with interest semi-annually at the rate of seven per cent per annum; that when the petitioner gave the note he knew he was bankrupt, and that his purpose in making it was to defraud his creditors; that he was then indebted to the respondent in a sum less than sixteen hundred dollars, and that the respondent took the mortgage and has since held it as security for the amount actually due him; that in the same year, shortly after giving the mortgage, the petitioner formed a partnership with one Lund, which continued until the bankruptcy of the partnership, in November, 1877; that upon such bankruptcy all their estate, real and personal, passed to their assignees under the provisions of U. S. Rev.

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Sts. § 5044; that the assignees took possession of the property and petitioned the court for leave to sell the equities in the real estate of the debtors; that on December 27, 1878, pursuant to an order of the court, the assignees sold and conveyed to the petitioner by a deed of release all the equity in this property; and that, on December 26, 1876, and prior to his bankruptcy, the petitioner wrote a letter to the respondent, a copy of which is as follows:

"Boston, Dec. 26, 1876.

"Mr. Graves, — Your letter was duly received, and you can rest assured that I am not forgetting you, but the business has been so hard that I could not get a dollar under any circumstances to give you. I have tried out of all the things I have to mortgage, sell, or do any way to make a raise to pay you as I have actually felt bad, hurt, and really ashamed to think I could not do something for you, and it has been just as much as we could possibly do to keep our business from going to the deuce or some worse place for the past 9 months, failures, losses and slow pay have cramped us up so close that it has actually been impossible to make any move of a personal nature in the way of fixing anything, but if you will keep still and give me time I will swing something into line for you one of these days, and I hope not so far distant as you would say would be no good. I think during the next summer I can make a real estate trade to help me out. Yours truly, N. Y. Brintnall.

"I will call and see you if it will do you any good, or if you have anything to say of importance; if not I don't want to talk about it till I can do something."

The master further found that, previous to the bankruptcy of the petitioner's firm, it had bought merchandise of the firm of C. H. Graves and Sons, of which the respondent was a member, but that when the above letter was written the petitioner's firm was not indebted to the respondent, nor to his firm, nor was the petitioner personally indebted to the respondent's firm, and that the letter referred to the personal indebtedness of the petitioner to the respondent existing when the mortgage was given; and that the petitioner had paid nothing on account of the debt secured by the mortgage, and had not since it was given recognized its existence as a valid mortgage, unless the foregoing letter

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and the acceptance of the deed of release from his assignees in bankruptcy were such a recognition.

Hearing upon the master's report, before *Holmes*, J., who dismissed the petition, and, at the request of the petitioner, reported the case for the consideration of the full court.

C. A. McDonough, for the petitioner.

J. P. Crosby, for the respondent.

KNOWLTON, J. The mortgage referred to purports to secure payment of a note for sixteen hundred dollars payable to the respondent with interest semi-annually at seven per cent per annum. The petitioner's purpose, or one of his purposes, in making it was to defraud his creditors. The master has found that he was then indebted to the respondent in a sum less than sixteen hundred dollars, and that the respondent took and has since held the mortgage as security for the amount actually due him. Perhaps it is immaterial in this case, but it does not appear that the respondent participated in the petitioner's fraudulent purpose. The master has found that the mortgage is valid for the amount for which it was taken, and that no part of that amount has been paid. The petition is brought under St. 1882, c. 237, to obtain a decree which shall operate as a bar to the respondent's claim under the mortgage. We have no occasion to determine whether the court could properly enter such a decree as the petitioner prays for in any case in which it appeared that there was a valid mortgage, the condition of which had not been performed. There is much force in the argument that the object of the statute is merely to provide for the removal of a cloud from the record title of the real estate, when it is encumbered by an undischarged mortgage which is not shown to be in force, and which has not been recognized by the mortgagor by payment or otherwise within twenty years after the time limited in it for the full performance of the conditions thereof.

It is enough for the decision of the present case that the petitioner wrote a letter within twenty years prior to the filing of the petition, which was an act in recognition of the mortgage. The master found that the letter referred to the personal indebtedness of the petitioner to the respondent, which was secured by the mortgage. In the letter the petitioner makes many apologies for his failure to pay anything on it, and promises, if he can

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have time, to do something towards the payment of it. The recognition by a mortgagor of an indebtedness known to be secured by a valid mortgage, unaccompanied by any objection to the mortgage, is a recognition of the mortgage.

The master's report, as we understand it, shows another act within twenty years in recognition of the mortgage. The petitioner and his copartners became bankrupts in November, 1877, and all of their estate, real and personal, passed to their assignees under the provisions of U. S. Rev. Sts. § 5044. A part of this property was the petitioner's right in equity to redeem this mortgage. The assignees took possession of the property and petitioned the court for leave to sell the equities in the real estate of the debtors. They sold the equity in this property to the petitioner by a deed of release. Their treatment of this as an equity of redemption in their petition for an order of sale, and their sale in pursuance of the order, must be assumed to have been in accordance with their real title, as found by the master and shown by the record in the registry of deeds. Their possession, petition for an order of sale, and sale, were all within twenty years prior to the filing of the petition, and their action was *prima facie* a recognition of this mortgage. The entry must therefore be, *Petition dismissed.*

CITY OF SOMERVILLE *vs.* SAMUEL WALKER & others.

Middlesex. March 15, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & LATHROP, JJ.

Statute — Erection or Restoration of Building — Permit — License — Ordinance.

The superstructure of a building in a city used for the storage, refining, etc. of crude petroleum or its products having burned down, it appeared that the value of the sills, girders, and piling that remained in the erection of a new building was $1200 for the piling and about $250 for the flooring, and that the cost of the original superstructure was $3,000, but that the estimated cost of restoring it was a little less. *Held*, that the proceeding to restore it was not the erection of a new building, but the repairing of an old one, and that it was not necessary to take out a license under St. 1894, c. 399, entitled, "An Act concerning the

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storage of petroleum or any of its products, and the erection and use of buildings therefor," or a permit under a city ordinance which required such permit except in the case of necessary repairs.

BILL IN EQUITY, filed August 23, 1894, to restrain the defendants from the erection of a building in violation of St. 1894, c. 399, and of the ordinances of the city of Somerville.

Trial in the Superior Court, before *Mason*, C. J., who dismissed the bill with costs; and the plaintiff appealed to this court. The facts appear in the opinion.

S. Z. Bowman, for the plaintiff.

J. H. Butler, for the defendants.

ALLEN, J. By St. 1894, c. 399, § 1, entitled "An Act concerning the storage of petroleum or any of its products, and the erection and use of buildings therefor," "No building for the storage, keeping, manufacture, or refining of crude petroleum, or any of its products, shall be erected in any city or town, unless the mayor and aldermen or selectmen thereof have granted a license therefor," etc. By § 3 of the same statute, "No regulations which the mayor and aldermen or selectmen have not now authority to impose shall be imposed upon or apply to a building or premises now and heretofore used for the business aforesaid." By Pub. Sts. c. 102, § 72, it is provided that crude petroleum or any of its products may be stored, kept, manufactured, or refined in detached and properly ventilated buildings specially adapted to the purpose, and surrounded by an embankment constructed so as effectually to prevent the overflow of said petroleum.

The superstructure of the defendants' building used for the above purpose had burned down, and they were proceeding to restore it, when this suit was brought to stop them, as no license therefor had been granted to them by the mayor and aldermen; and the question which we have to consider is, whether, according to the true construction of St. 1894, c. 399, § 1, it should be held that they were going on to erect a building, or merely to repair an old building.

There is no dispute before us as to the facts. The plaintiff in its brief says: "Taking the sills, girders, and piling that remained after the fire, their value in the erection of a new building is twelve hundred dollars for the piling, and about two hundred and fifty dollars for the flooring, making $1,450. The building

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rested on piles. There was no dispute as to these figures; in fact, they were furnished by the respondents' witnesses." The cost of the original superstructure was three thousand dollars, but the estimated cost of restoring it was a little less.

It has sometimes been found hard to define the word "building," — see *Stevens* v. *Gourley*, 7 C. B. (N. S.) 99, — but in this Commonwealth the word has often been held to include partly destroyed or unfinished structures. An example of this is found in *Watertown* v. *Sawyer*, 109 Mass. 320, where it was held that the accidental destruction by fire, after the passage of St. 1871, c. 167, of the combustible parts of a building which had been used by its owner before the passage of the statute for carrying on therein the business of slaughtering cattle or other animals, did not forfeit the owner's right to continue the same business in a new building of no greater size or capacity, erected on the same site, without the permission of the selectmen. It is true that the words of the statute were "building or premises," and for this reason the decision is not fully in point. In tax cases, also, a very liberal construction of the word has been given. In *Trinity Church* v. *Boston*, 118 Mass. 164, the work of building the church had been begun by driving piles for the foundation of the building, and no further progress had been made, when a tax was assessed by the city on the land; but it was held to be exempt, under the statute exempting houses of religious worship, the work of erection having been begun, and prosecuted without unreasonable delay. See also *New England Hospital* v. *Boston*, 113 Mass. 518, and *Old South Society* v. *Boston*, 127 Mass. 378. So under the mechanic's lien law, if work is done in laying a foundation, and the construction of the building proceeds no further, no doubt the mason would be entitled to his lien. *Truesdell* v. *Gay*, 13 Gray, 311. *Carew* v. *Stubbs*, 155 Mass. 549. It is quite plain that a building may be partly under ground; and in *Attorney General* v. *Gardiner*, 117 Mass. 492, a structure mostly below ground and only three and a half feet high, covered with turf, was held to be a building, within the meaning of a restriction against the erection of buildings. And in *Commonwealth* v. *Squire*, 1 Met. 258, it was held that a building need not be a completed structure.

In construing statutes in restraint of trades and business, a

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somewhat liberal construction is usually given in favor of persons who have established plants for carrying on such trades or business, and in view of the course of decisions in this Commonwealth, as shown above, we think that there was enough of the old building left after the fire to entitle the defendants to restore it to its former size and capacity, without obtaining a license under the provisions of St. 1894, c. 399.

A similar construction is to be given to the city ordinance relied on by the plaintiff. That ordinance prohibits erecting, adding to, or altering a building without a permit from the inspector of buildings, but necessary repairs are expressly excepted from its operation. It does not apply to the restoration of the building in the present case. The ruling of the Chief Justice of the Superior Court was therefore right.

Decree affirmed.

ABIGAIL M. GIBSON *vs.* IMPERIAL COUNCIL OF THE ORDER OF UNITED FRIENDS & another.

Suffolk. March 15, 1897. — May 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & LATHROP, JJ.

Beneficiary Association — Validity of Designation of Beneficiary — Foreign Corporation — Lex Loci Contractus — Statute.

Under St. 1888, c. 429, § 11, the designation, in a benefit certificate issued by a corporation organized under the laws of another State and transacting business in this Commonwealth conformably to law, of a person resident in this Commonwealth who could not take under a certificate issued by such a corporation organized here, is valid, if permitted by the laws of the other State and of the corporation; and the contention that the corporation was authorized under the laws of the other State to do what is considered in this Commonwealth an accident and life insurance business as well as the business done by fraternal benefit associations, and that the contract is one of life insurance, is immaterial, for, even if the certificate should be regarded as a policy of life insurance, the contract was valid at the time when it was entered into, although the association had not complied with the requirements of Pub. Sts. c. 119.

BILL IN EQUITY, to obtain a fund payable under a benefit certificate issued to one Emma L. Gibson. Hearing before *Holmes*, J., who ruled that the designation of the beneficiary

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was not contrary to the policy of the law of this Commonwealth, and that the fund should be paid to Mary E. Southwick, the beneficiary named in the certificate; and, at the request of the plaintiff, reported the case for the determination of the full court. The facts appear in the opinion.

L. M. Child, for the plaintiff.

H. R. Bailey, (*D. F. Kimball* with him,) for Mary E. Southwick.

FIELD, C. J. As the association is ready to pay the sum of money named in the benefit certificate to the person whom the court shall adjudge to be entitled to it, the principal question is whether or not Mary E. Southwick, the beneficiary designated in the certificate, is entitled to it. Mary E. Southwick is a stranger in blood to Emma L. Gibson, and was not dependent upon her. The association is a corporation organized under the laws of the State of New York, and had a place of business in Massachusetts, and Mary E. Southwick was and is a resident of Massachusetts. The certificate was issued on December 15, 1882, in Massachusetts, to Emma L. Gibson, who was a resident of Massachusetts. The plaintiff is a sister of Emma, and was dependent upon her.

The justice who heard the case has found as a fact that the designation of Mary E. Southwick as the person to whom the sum should be paid on the death of Emma L. Gibson "was valid by New York law and under the laws of the corporation"; and this is in effect admitted. The contention is that as at the time when the certificate was issued such a designation in the certificate of a Massachusetts fraternal benefit association was invalid, the same law governs in this case, as the certificate was issued in Massachusetts to a resident citizen thereof. Pub. Sts. c. 115, § 8. The association, on October 17, 1888, appointed the insurance commissioner of this Commonwealth its attorney upon whom all processes might be served, pursuant to St. 1888, c. 429, § 13, and it made reports to the insurance commissioner annually, "with a few omissions," as required by §§ 11 and 12 of the same chapter.

We are of opinion that the question of law raised in this case was in effect decided in *United Order of the Golden Cross* v. *Merrick*, 165 Mass. 421.

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It is contended by the plaintiff's counsel that the association was authorized under the laws of New York to do what is considered in Massachusetts an accident and life insurance business, as well as the business done by fraternal benefit associations, and that the contract shown in this case is one of life insurance. But even if this certificate should be regarded as a policy of life insurance, the contract was valid at the time when it was entered into, although the association had not complied with the requirements of Pub. Sts. c. 119. See Pub. Sts. c. 119, § 200. *Reliance Ins. Co.* v. *Sawyer*, 160 Mass. 413. See also St. 1887, c. 214. The first statute of this Commonwealth relating to fraternal beneficiary corporations organized under the laws of other States is, so far as we know, St. 1888, c. 429, §§ 11 *et seq.*

The amount due should be paid to Mary E. Southwick; the details of the decree may be settled by a single justice.

So ordered.

LOUIS TIM & another *vs.* MYER ROSENFELD.

Suffolk. March 4, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Motion to set aside Verdict rendered in absence of Parties and Counsel, and after Proclamation of Adjournment.

A verdict may be taken in the absence of the parties and their counsel, notwithstanding a proclamation of adjournment of the court until the next day has been made.

MOTION to set aside a verdict, and for a new trial. The Superior Court overruled the motion; and the defendant alleged exceptions. The grounds of the motion appear in the opinion.

C. H. Sprague, for the defendant, submitted the case on a brief.

E. N. Hill, for the plaintiffs.

BARKER, J. After the jury had retired in the latter part of the afternoon, the court proceeded with other business, and then the crier by direction made a proclamation of adjournment until

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the next day, and the defendant and his counsel left the court room, supposing that the court had adjourned, and that the verdict would not be received until the next day. Immediately after the proclamation was made the presiding justice directed that it be recalled, and that the court remain open, and he then took a recess and left the court house, directing the officers to send word to him if the jury should agree before his return. The jury agreed upon their verdict, word was sent to him, he returned to the court room upon the same afternoon, and the verdict was then returned, received, and affirmed in open court in the usual way, and the jury discharged from further consideration of the case. Both parties and their counsel were absent when the verdict was returned. The defendant moved to set aside the verdict, alleging the facts above stated, and excepted to the order overruling his motion.

It is provided by St. 1885, c. 384, § 2, that the courts shall be always open, and that any business of the courts may be transacted at any time. Whatever, before the passage of this statute, may have been the power of a court to recall a proclamation of adjournment, (see *Blake* v. *Bayley*, 16 Gray, 531,) the usual proclamation of adjournment at the close of the ordinary business of the day cannot now interfere with the power of a presiding justice to receive in open court the verdict of a jury after the proclamation, and before the time to which the court is said to be adjourned. The proclamation is merely the announcement to the public that the presiding justice expects to do no more business in court until the time stated, and it excuses parties and witnesses from attendance until that time. If in the mean time, for proper reasons, the judge returns to the court room, and is attended by the officers of the court, the court is open, and he may proceed with such business as does not require the presence of persons who are absent. Under our practice it is usual and proper to receive the verdict of a jury, at least in civil causes, without regard to the presence or absence of parties or counsel.

The defendant suggests no reason why he was prejudiced by the course of the presiding justice in the present case. If any such reason had existed, it would doubtless have been given due weight in the consideration of his motion in the Superior Court.

Exceptions overruled.

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THOMAS HUGHES *vs.* MALDEN AND MELROSE GAS LIGHT COMPANY.

Suffolk. March 8, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — Master and Servant — Owner's Risk — Evidence.

At the trial of an action against a gas light company for personal injuries to the plaintiff, while in its employ, caused by the caving in of the sides of the trench in which the plaintiff was at work, there was evidence that the trench had been dug four days previously by a city in one of its streets, and that although the earth in that vicinity was constantly shaken by the moving of trains and heavy teams, and although the trench was six feet wide and of about the same depth, having earth thrown up on either side to an additional height of eighteen inches, it had not been shored or braced; that by the digging of the trench, over which the defendant had no control, its gas pipe had been exposed, and that, pursuant to orders from the city to remove such pipe from the trench, it set the plaintiff to removing it; that the plaintiff had had two or three years' experience in digging trenches; and that the accident happened after he had been at work three hours, and just after the defendant's superintendent had left the trench. *Held*, that the plaintiff was not entitled to recover, either at common law or under the employers' liability act, and that evidence offered by him that he made no examination of the trench, but relied on the defendant's superintendent to provide for his safety, was properly excluded.

TORT, for personal injuries received by the plaintiff, while in the employ of the defendant, in consequence of the caving in of the sides of a trench in which the plaintiff was at work.

Trial in the Superior Court, before *Hopkins*, J., who, at the close of the evidence, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

S. A. Fuller & C. H. Blood, (*C. F. Smith* with them,) for the plaintiff.

J. Lowell, Jr., for the defendant.

HOLMES, J. This is an action for personal injuries caused by the caving in of the sides of a trench in which the plaintiff was at work. There is a count at common law for not shoring the sides, and one under the employer's liability act (St. 1887, c. 270) for negligence of the defendant's superintendent in omitting the

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same precaution. A third was added for negligently setting the plaintiff at work in an unsafe place. The case differs from those which have been before the court in the fact that the defendant was not digging the trench, and, so far as appears, had no control over it. The trench was in a street in Malden, and had been dug by the city. In the process, the gas pipe of the defendant had been exposed for about a hundred feet and supported by stringers, and the defendant was ordered to remove it. The defendant's superintendent visited the place, and the next morning set the plaintiff and some other men to removing the pipe. The plaintiff had had two or three years' experience in digging trenches. This trench was six feet wide and five feet and ten inches deep, and the earth was thrown up on the sides to a height of about a foot and a half, thus somewhat increasing the pressure. It was not shored, and had been open about four days, which increased the danger of the bank falling. Also the earth was shaken by the constant moving of heavy wagons and trains in the neighborhood. The accident happened after the plaintiff had been at work about three hours, and just after the superintendent had left. The presiding judge excluded the plaintiff's testimony that he made no examination of the trench, but relied on the superintendent to provide for his safety, and directed a verdict for the defendant. The case is here on exceptions.

The offer of evidence may be disposed of in a few words. If the plaintiff relied on the defendant for more than he had a right to, he did so at his own peril, and he had no right to prove it. If he only relied on those precautions being taken which it was the defendant's duty to take, evidence was superfluous to show that he had not waived his rights. Whichever may have been the case, the private operations of the plaintiff's mind were no measure of the defendant's duty.

The only question is what the plaintiff had a right to expect from the defendant when set to work in such a place. He had not a right to expect it to shore the sides of the trench or to make it safer than it was, because, as was manifest, and as the plaintiff must be taken to have known, the defendant had no control over the trench. He had a right to expect that, if the defendant knew of any danger which the plaintiff did not know

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and ought not to be assumed to know, it would inform him. But no such knowledge on the part of the defendant was shown. It does not appear to have known anything except what was visible to the eye, or to have been able or bound to infer from what was visible anything which the plaintiff with his experience was not equally able to infer. What more could it have done? There is no reason to suppose that inspection would have disclosed anything beyond the visible facts, and therefore it is not necessary to consider whether the duty of inspection existing with regard to cars received from connecting lines to be forwarded on a railroad would be held to exist in such a case as this. Compare *Regan* v. *Donovan*, 159 Mass. 1, and *Kanz* v. *Page*, *ante*, 217, with *Keith* v. *New Haven & Northampton Co.* 140 Mass. 175, 180, and *Haley* v. *Case*, 142 Mass. 316. The only thing which we think of as possible is that the defendant might have inquired how long the ditch had been dug, as bearing on the chance of a fall, and then have told the plaintiff. But it seems to us that it would be more straightforward to require the defendant to insure the plaintiff than to allow a recovery to be based upon the omission of such an inquiry as an excuse for a verdict. All the large elements of the risk being manifest, and being thrown upon the plaintiff, it would be an evasion of the law to lay hold of a small secondary circumstance as a ground of distinction. See *Kelly* v. *Abbot*, 63 Wis. 307.

Exceptions overruled.

MALVINA A. CAMPBELL *vs.* SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD.

Worcester. March 9, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Beneficiary Association — Construction of Laws — Forfeiture of Membership — Effect of mailing Money for Reinstatement — Death of Suspended Member before Receipt of Money — Action.

Where the laws of a beneficiary association provide that if the secretary of a section fails to forward the monthly collections to the board of control on or before

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the last day of the month, the section and its members shall stand suspended and their certificates forfeited, and that if the money is paid to the board of control within thirty days after such default the section and its members may be reinstated, the payment does not become effectual until its receipt by the board of control; and if the money of a section is sent by mail on the first day of the month following a default to the board of control in another State, and arrives there on the third day, which is Sunday, and is delivered on the fourth day of the month, and a receipt for the money is sent on that day, which is expressed to be on the condition that all the members for whom the payment is made are living at the date of the receipt, and a member of the section, who has paid all his assessments, dies on the third day of the month, no action can be maintained upon his certificate of membership.

CONTRACT, to recover $1,000 under a certificate of membership issued by the defendant corporation to George Campbell, and payable to the plaintiff, who was his widow. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

F. B. Smith, for the defendant.

C. M. Rice, for the plaintiff.

ALLEN, J. The decision of this case depends upon the construction to be given to the following provisions of the Revised General Laws of the defendant:

"The secretary of a section shall forward to the Board of Control the monthly payments and dues collected, immediately after the tenth day of each and every month.

"If such payments and dues are not received by the Board of Control on or before the last day of the same month, the section so failing to pay, and all members thereof, shall stand suspended from membership in the endowment rank, and their certificates, and all right, title, and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the secretary of the Board of Control to the president and secretary of such section.

"Provided, that the section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all rights as a section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if, within thirty days from the suspension of warrant, said section shall pay to the Board of Control the amount of all monthly payments, assessments, or dues accrued upon said members."

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There was also another provision of the General Laws as follows: "Officers of sections are the agents of the members, and shall in no wise be considered as the agents or the representatives of the Board of Control of the Endowment Rank or of the Supreme Lodge."

Campbell, the member whose right is here involved, had duly paid all his assessments, including that for February, 1895, to the secretary of his section, but the secretary had failed duly to forward the collections for that month. But on Friday, March 1, 1895, he mailed the same to the Board of Control at Chicago, in an envelope furnished for that purpose by said board, with the full address of said board printed thereon. This letter was received at the Chicago post office on Sunday morning, March 3, at 4 A. M., and was delivered by a mail carrier at the office of the Board of Control on the morning of Monday, March 4. The Board of Control on the same day sent a receipt for the money, which was expressed to be on condition that all the members for whom the payment was made were living at the date of the receipt. Campbell died on Sunday, March 3, at 10 A. M. The only question presented to us is whether, before the death of Campbell, the members of said section, and Campbell as one of them, had regained their rights and privileges held previous to the suspension and forfeiture by reason of the mailing of the letter to the Board of Control on March 1. It is admitted that a suspension of membership and forfeiture occurred at the expiration of the last day of February, by reason of the Board of Control not having received the February dues. But the plaintiff contends that by the terms of the general law the defendant offered to restore members to their full rights, if within thirty days their section should pay the monthly dues; and that upon the mailing of the letter of March 1 this offer became a complete and binding contract, and that the payment was made on that day.

It has been held that where an agent to collect money or a debtor has been authorized, either by express direction or by a course of dealing, to remit money by mail, and deposits a letter containing such money in the post office, the money is thenceforward at the risk of the creditor. *Buell* v. *Chapin*, 99 Mass. 594. *Gurney* v. *Howe*, 9 Gray, 404. *Crane* v. *Pratt*, 12 Gray, 348. *Morgan* v. *Richardson*, 13 Allen, 410. But the present

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case does not fall within that rule. Here a forfeiture had occurred. The members had the privilege of becoming reinstated upon making payment. They might or might not avail themselves of this privilege. By the earlier portion of the general law the forfeiture occurred if the payments were not received by the Board of Control on or before the last day of the month. By the latter portion, the members were to regain their rights if within thirty days the section should pay the amount of the assessments and dues to the Board of Control. Such payment did not become effectual till its receipt by the Board of Control. The case is much like ordinary cases of insurance, where a forfeiture has occurred through a failure to pay a premium or assessment when due. Acceptance of the money afterwards waives the forfeiture and restores the policy. *Shea* v. *Massachusetts Benefit Association*, 160 Mass. 289, 294, and cases there cited. *Bouton* v. *American Ins. Co.* 25 Conn. 542. So in beneficiary associations, the levy and acceptance of assessments after a forfeiture have the same effect. *Rice* v. *New England Mutual Aid Society*, 146 Mass. 248. *Rindge* v. *New England Mutual Aid Society*, 146 Mass. 286. But in all of these cases there is no intimation that merely mailing the money in a letter will be sufficient to avoid a forfeiture. By the true construction of the general law, such reinstatement is not established till the money is paid to the Board of Control, and this payment is not made merely by depositing a letter containing the money in a post office. *Shea* v. *Massachusetts Benefit Association*, 160 Mass. 289, 295.

There is nothing in the agreed statement of facts to show that by usage or course of dealing the defendant took the risk of the safe transmission of money in this manner. On the other hand, the risk fell upon the senders of the money; because, by the terms of the general law, if the payments were not duly received by the Board of Control, the members were suspended from membership. It is not stated in the agreed facts whether the amounts were sent by actual money, or by check; and perhaps, if it would help the plaintiff, we should assume that the former mode was adopted. But, so far as appears, no loss ever occurred, and no question of this kind arose. In the previous instances of delayed payments and waivers, the waivers took effect appar-

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ently from the date of the actual receipt of the money by the Board of Control. No instance is mentioned where a member died between the time when the money was mailed and the time when it was received. *Judgment for the defendant.*

MELVILLE M. WESTON, assignee, *vs.* EBEN D. JORDAN.

Suffolk. March 9, 10, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Insolvent Debtor — Preference — Purchase of Stock on Margin.

If shares of stock are bought through a broker, to whom a part of the purchase price is paid as a margin, and he, having undertaken to carry the stock for the purchaser, fails so to do, and on demand is unable to deliver it, and the purchaser subsequently pays the balance of the purchase price, and, knowing or having reason to know that the broker is insolvent and that he has bought the stock in the market, receives from him the stock bargained for, which is then worth more than the sum paid by him, this transaction, to the extent of the excess of the value of the stock so delivered above the sum paid to the broker, is a preference in violation of Pub. Sts. c. 157, § 96.

TORT, by the assignee in insolvency of Philip D. Wheatland, to recover the difference between certain sums of money paid to Wheatland by the defendant on October 9, 11, and 18, 1889, and the then market value of certain shares of stock which it was alleged Wheatland had transferred and delivered on those dates to the defendant, with a view to giving a preference in violation of the insolvent laws. The action was commenced on October 25, 1894, and, upon the death of the defendant on November 15, 1895, his executors appeared and defended.

At the trial in the Superior Court, before *Lilley*, J., there was evidence that Wheatland, prior to his insolvency in November, 1889, was a stockbroker, doing business in Boston; that, at various times during the years 1888 and 1889 he had, at the defendant's request, purchased for him 3,500 shares of stock of the Chicago, Burlington, and Quincy Railroad Company, for which, as purchased, the defendant paid margins of about ten

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dollars upon each share; that on May 24, 1889, of these shares 500 had been sold, and on June 7, 1889, 500 had been fully paid for by the defendant and delivered to him; that between the latter part of June, 1889, and the following October, the defendant repeatedly asked Wheatland for the remaining shares of stock purchased for him, but that Wheatland put him off with various excuses, generally saying that it was not convenient; that after July 1, 1889, Wheatland ceased to hold the 2,500 shares bought for the defendant, and had no stock of that description under his control except such as passed through his office in consequence of dealings for customers other than the defendant; that in the summer of 1889, subsequent to June 7, he became insolvent, and on November 18, 1889, a petition in insolvency was filed against him, and on December 6, 1889, the plaintiff was chosen assignee, but Wheatland's credit was not questioned, nor his business paper protested, until after October 30, 1889; that on October 9, 11, and 18, 1889, respectively, the defendant paid to Wheatland three several sums of $48,000, $49,000, and $21,227.24, for which, on each of the first two dates, he received 500 shares, and on the last 200 shares of the stock of the Chicago, Burlington, and Quincy Railroad Company; that the market value of the shares so delivered on October 9 and 11 was $54,018.75 and $54,000 respectively, and of those delivered on October 18 was $21,400; and that those prices were paid by Wheatland, who purchased the stock through other brokers. There was also evidence that between July 1 and October 9, 1889, the defendant, who insisted upon having the particular shares purchased by him, had reason to know that Wheatland had ceased to hold any of the 2,500 shares originally purchased for him, but the defendant contended, and there was evidence tending to show, that he supposed that the stock had been pledged.

The defendant requested the judge to instruct the jury:

"1. That upon the evidence the plaintiff was not entitled to recover. 2. That if the defendant's testator purchased certain shares of stock through Philip D. Wheatland, a stockbroker, giving said Wheatland certain moneys in part payment thereof, with the agreement or understanding that said Wheatland was to hold said stock until the same was fully paid for by the

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defendant's testator, or sold by him, the relation between the defendant's testator and said Wheatland is that of pledgor and pledgee. 3. If the defendant's testator purchased through Philip D. Wheatland, a stockbroker, and while said Wheatland was solvent, certain shares of stock, giving Wheatland certain moneys in part payment thereof, and if he subsequently paid the balance of the purchase price and took the stock, he is entitled to hold it against said Wheatland's assignee in insolvency, although he may have had reason to know that said Wheatland was insolvent at the time the shares were so ultimately paid for and taken. 4. That if the defendant's testator purchased through Philip D. Wheatland, a stockbroker, and while said Wheatland was solvent, certain shares of stock, giving said Wheatland certain moneys in part payment thereof, with the agreement or understanding that said Wheatland was to carry the same until fully paid for by the defendant's testator, or sold by him, and subsequently the defendant's testator paid for said shares in full, and received them from said Wheatland, the plaintiff cannot recover in this action without satisfying the jury that the defendant's testator knew that said Wheatland did not have said shares in his possession or under his control at the time he so transferred them to the defendant's testator. 5. It is immaterial that Philip D. Wheatland, the broker, did not at the time he transferred the shares of stock in question have them actually in his possession, or under his control, if that fact was not communicated to the defendant's testator. 6. The plaintiff cannot recover unless he proves to the satisfaction of the jury that at the time of the transactions in question an indebtedness existed, and was recognized to exist, from Wheatland to Jordan, and that something was given in payment or part payment thereof, contrary to the provisions of the Massachusetts insolvent law. 7. In order to recover, the plaintiff must show that at the time of the transaction in question a debt was due from Wheatland to Jordan, or a claim existed of Jordan against Wheatland. 8. The amount claimed here, being the difference between the market price of the stock in question and the balance due upon it, was not a debt from Wheatland to Jordan, nor a claim of Jordan against Wheatland at the time of the transactions in question. 9. If Wheatland in transferring the stock in question to Jordan in-

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tended simply to carry out his contract with Jordan, and not to give him a preference, the plaintiff cannot recover."

The judge refused to give the first, second, and eighth requests for instructions, but gave the fourth, fifth, sixth, seventh, and ninth requests, and the third with the following qualification: "If Jordan, knowing nothing of Wheatland's disposition of these shares which he had bought for him pursuant to his order, knowing nothing of Wheatland's inability to deliver those or any other shares to him, supposed at the time when he paid these sums to Wheatland on October 9, 11, and 18, that he was paying the balance of the purchase price of the stocks when they were bought by Wheatland."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

B. L. M. Tower, (*F. A. North* with him,) for the defendant.

R. M. Morse, (*M. M. Weston* with him,) for the plaintiff.

ALLEN, J. The defendant contends that the relation between Jordan and Wheatland was that of pledgor and pledgee, and that the transactions complained of by which Jordan paid to Wheatland the balance of the cost of the shares and received from Wheatland the shares were entirely legitimate, being merely a carrying out of the contract upon which the shares were bought, and not voidable as a preference under the insolvent laws.

When a broker buys shares on a margin and carries them for his customer, it has been held in some States that the relation between the customer and the broker is that of pledgor and pledgee. *Markham* v. *Jaudon*, 41 N. Y. 235. *Skiff* v. *Stoddard*, 63 Conn. 198. *Brewster* v. *Van Liew*, 119 Ill. 554. This view has not hitherto been accepted in Massachusetts. *Wood* v. *Hayes*, 15 Gray, 375. *Covell* v. *Loud*, 135 Mass. 41. The defendant seeks to have these decisions reconsidered; but the facts of the present case do not call for such reconsideration of the general doctrine. Even if at the outset Jordan were to be deemed a pledgor, and Wheatland a pledgee, of the shares, that relation was changed by what happened afterwards. The bill of exceptions recites that it appeared in evidence that, between the latter part of June, 1889, and the transactions in question in October, 1889, Jordan repeatedly asked for the shares bought for him by Wheatland, and that Wheatland put him off with various ex-

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cuses, generally saying that it was not convenient; that some time in the summer of 1889 subsequently to June 7, Wheatland became insolvent; and that subsequently to July 1, 1889, Wheatland had no stock of this kind under his control, except such as passed through his office in consequence of dealings for other customers. Under the doctrine as held in New York, Wheatland was bound always to have on hand enough shares to meet the purchase for Jordan. *Taussig* v. *Hart*, 58 N. Y. 425. *Baker* v. *Drake*, 66 N. Y. 518. And if the shares were sold, Jordan might require him to replace them and hold him responsible for a failure to do so. *Colt* v. *Owens*, 90 N. Y. 368. After Wheatland had parted with the control of the shares, and after repeated demands for them by Jordan and refusals by Wheatland to deliver them, Jordan had a valid ground of action against Wheatland, either for breach of contract or for a conversion; it matters not which. If Wheatland had refused on demand to deliver the shares when they were high, and they had afterwards fallen in value, we cannot accede to the defendant's contention that Wheatland could still have compelled Jordan to take them up, and pay the balance of the cost. But Jordan's right of action against Wheatland had accrued; and this was a debt which would be provable in insolvency against Wheatland. Pub. Sts. c. 157, § 26. *Lothrop* v. *Reed*, 13 Allen, 294. Therefore, when by later transactions he transferred to Jordan valuable rights, namely, shares bought by him in the market which were worth more than Jordan paid to him, Jordan was not regaining control of property which in any sense belonged to him, but he was obtaining a preference to the extent of such excess of value. He became richer and Wheatland became poorer by just that amount.

It is however contended that it did not appear as a fact that Jordan knew that Wheatland had sold the shares, but that there was evidence tending to show that he supposed Wheatland had pledged them, and that Jordan insisted upon having his particular shares, and actually paid the money for them. But the instructions given to the jury fully saved to the defendant the benefit of this ground of contention. Those instructions were as follows, the court adopting the defendant's requests upon this subject, with a certain qualification:

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"If Jordan purchased through Philip D. Wheatland, a stock-broker, and while said Wheatland was solvent, certain shares of stock, giving Wheatland certain moneys in part payment thereof, and if he subsequently paid the balance of the purchase price and took the stock, he is entitled to hold it against said Wheatland's assignee in insolvency, although he may have had reason to know that said Wheatland was insolvent at the time the shares were so ultimately paid for and taken; if Jordan, knowing nothing of Wheatland's disposition of these shares which he had bought for him pursuant to his order, knowing nothing of Wheatland's inability to deliver these or any other shares to him, supposed at the time when he paid these sums to Wheatland on October 9, 11, and 18, that he was paying the balance of the purchase price of the stocks when they were bought by Wheatland.

"If Jordan purchased through Philip D. Wheatland, a stock-broker, and while said Wheatland was solvent, certain shares of stock, giving said Wheatland certain moneys in part payment thereof, with the agreement or understanding that said Wheatland was to carry the same until fully paid for by Jordan, or sold by him, and subsequently Jordan paid for said shares in full, and received them from said Wheatland, the plaintiff cannot recover in this action without satisfying the jury that Jordan knew that said Wheatland did not have said shares in his possession or under his control at the time he so transferred them to Jordan.

"It is immaterial that Philip D. Wheatland, the broker, did not at the time he transferred the shares of stock in question have them actually in his possession, or under his control, if that fact was not communicated to Jordan.

"The plaintiff cannot recover unless he proves to the satisfaction of the jury that at the time of the transactions in question an indebtedness existed, and was recognized to exist from Wheatland to Jordan, and that something was given in payment or part payment thereof, contrary to the provisions of the Massachusetts insolvent law.

"In order to recover, the plaintiff must show that at the time of the transaction in question a debt was due from Wheatland to Jordan, or a claim existed of Jordan against Wheatland.

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"If Wheatland in transferring the stock in question to Jordan intended simply to carry out his contract with Jordan, and not to give him a preference, the plaintiff cannot recover."

These instructions virtually adopted the defendant's view of the law, and certainly were sufficiently favorable to him. Indeed, they gave to the defendant all the benefit he would derive from the theory that the relation between Jordan and Wheatland at the outset was that of pledgor and pledgee. They required the jury, in order to render a verdict for the plaintiff, to find various facts which contained all the elements of a preference. Stating the doctrine generally, if a person has bought certain shares of stock through a broker, and has paid to the broker part of the purchase price as a margin, and the broker has undertaken to carry the stock for him, but has failed to keep the same or any shares of that kind of stock in his hands, and has been unable and has refused to deliver such shares to the customer on demand, and the customer subsequently pays to the broker the balance of the purchase price and receives from him the number of shares bargained for, which are then worth more than the sum which he pays, knowing or having reasonable cause to know that the broker is not then solvent, and that he has procured the shares by purchase in the market, this is a preference, and in violation of the insolvent laws, to the extent of the excess of the value of the shares so delivered above the sum then paid to the broker therefor.

This being our view of the law, we understand that the defendant's exceptions to the admission of evidence are not insisted on.

Exceptions overruled.

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JOHN L. MURCH *vs.* THOMAS WILSON'S SONS AND COMPANY.

Suffolk. March 10, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Obvious Risk.

At the trial of an action for personal injuries, it appeared that the plaintiff was employed to pilot the defendant's steamship from Boston to Gay Head; that at about midnight on the first day out, the weather being cold and stormy and the plaintiff having occupied for a long time an exposed situation on the bridge of the vessel, was invited by one of the ship's officers to go into the chart room, just behind the bridge, for warmth and shelter; that the room, which was small, contained two portholes and two small ventilators, and a door opening on the deck so arranged as to be fastened open; that it was heated by a stove which was not provided with a smoke pipe to the outer air, and in which a patent fuel was burned; that when he first went to the chart room one of the officers of the vessel cautioned him to keep the door hasped back and there would be no danger from the fumes of the stove; that, although he on coming aboard the vessel had had a state room assigned to him, he used it but once, and from time to time, while navigating the vessel, went into the chart room, but always kept the door open; and that while so occupying the chart room on the second day out he fell asleep on a lounge, and rolled from it to the floor and against the stove, in consequence of which he was severely burned and rendered unconscious for a long time from the fumes of the stove. *Held*, that the defendant owed the plaintiff no duty to change the construction of its chart room or of the stove by which it was heated; that the plaintiff assumed the risk of the accident; and that the action could not be maintained.

TORT, for personal injuries sustained by the plaintiff while in the employ of the defendant, from asphyxiation and burning on board the defendant's steamship on February 20, 1893.

Trial in the Superior Court, before *Sherman*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff, who was a coast pilot, had been employed by the defendant to pilot its steamship, the Persian Monarch, from Boston to Gay Head, and on the morning of February 19, 1893, he went aboard the steamship for that purpose. Before he assumed charge of the navigation of the vessel a first class state room in the passenger cabin on the main deck was assigned to him by the chief steward, in which he deposited his bag of clothes. The plaintiff assumed charge of the navigation of the vessel at

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about eight o'clock in the morning, taking his station for that purpose on the bridge which was situated on the upper deck just forward of the mainmast. At about three o'clock in the afternoon of the same day the vessel encountered snow squalls and mist, and the plaintiff at that time went to his state room and put on the sea clothes which he had left there. At about midnight the third officer went to him on the bridge and informed him that the vessel had a chart room or deck house where he could sit and get warm, and, telling him that he would be called when wanted, took him to the chart room which they both entered. The chart room was situated amidships on the same deck as the bridge, and a few feet aft of it. It was about six feet square, and between six and seven feet in height, and had a door opening outwardly which could be held open four or five inches by a hasp. The room, among other furniture and fixtures, contained a cushioned seat on either side, and a stove in the centre, fastened to the floor. It was lighted by two portholes, and had two ventilators about three inches in diameter placed in the door and ceiling respectively, and capable of being opened from the inside. The stove burned some kind of patent fuel, but had no smoke pipe leading to the outer air. The plaintiff resorted to this chart room on several occasions, and about noon on Monday he again went into it, laid down on one of the seats, fell asleep, and while asleep fell from his couch against the stove, in consequence of which he was severely burned about the body and rendered unconscious by the fumes from the stove. About an hour later he was found unconscious in a kneeling posture over the stove, with his side pressed against it, his arm resting on and partly around it, and his hand thrust into the opening of the stove.

The plaintiff testified that soon after he went into the chart room for the first time, the first mate also entered, and tried to open the dead-lights, but could not do so because they were frozen; that he then said, "Pilot, we are burning a patent fuel here, an American fuel, we do not know what it is, whether there is any danger in it or not, but keep that door hasped back, and there will be no danger"; that the mate then went out leaving the door hasped open; and that the plaintiff at no time noticed any fumes from the stove, and that he always kept the door hasped

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open. He further testified that when he went into the chart room on Monday noon he had to unhook the door, and after entering hasped it partly open as he had found it; that while he was lying down the captain came to get his glasses, and when the plaintiff started up he said, "Pilot, lie still, lie still"; that the fire was then very low, but when he was almost asleep the third mate came in, and ordered one of the crew, who was with him to get some fuel and fill up the stove; that he knew nothing more until after the accident, and that when he went to sleep the door was hooked open, and he did not know that any one closed it. This was all the material evidence in the case.

At the close of the plaintiff's case, the judge, at the defendant's request, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

R. D. Weston-Smith & C. Walcott, for the plaintiff.

A. H. Russell, (*C. T. Russell* with him,) for the defendant.

KNOWLTON, J. The chart room and the stove by which it was heated were a part of the permanent construction and arrangement of the steamship, and in all their details they were open to the observation of everybody who came upon that part of the ship. Such danger as there was from the use of them to one who engaged to act as pilot was an obvious risk of the business, which was covered by his contract to serve on that ship. Parties entering into a contract for service by one of them make their engagements in reference to the subject matter to which the contract relates, and their rights and liabilities depend upon the contract as applied to the subject with which they are dealing. The employee impliedly agrees to assume all the obvious risks of the business in which he contracts to work. Among these are the open, manifest dangers attendant upon the use of the ways, works, and machinery of a permanent character that are plainly intended to be retained as a part of the plant to which the contract for service relates. It has often been held that an employer owes his employee no duty to change a business in these particulars in order to make it safer, even though in some parts his ways and works would not be deemed reasonably safe and proper if he were starting a new establishment to do the same kind of work under an arrangement with employees to serve in

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a business afterwards to be established. *Ladd* v. *New Bedford Railroad*, 119 Mass. 412. *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 79. *Coombs* v. *Fitchburg Railroad*, 156 Mass. 200. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135. *Fisk* v. *Fitchburg Railroad*, 158 Mass. 238. *Goodridge* v. *Washington Mills*, 160 Mass. 234. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 158. *Feely* v. *Pearson Cordage Co.* 161 Mass. 426. *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287. *Austin* v. *Boston & Maine Railroad*, 164 Mass. 282. *Content* v. *New York, New Haven, & Hartford Railroad*, 165 Mass. 267. *Sweeney* v. *Berlin & Jones Envelope Co.* 101 N. Y. 520. *Appel* v. *Buffalo, New York, & Philadelphia Railway*, 111 N. Y. 550. *Hayden* v. *Smithville Manuf. Co.* 29 Conn. 548. *Tuttle* v. *Detroit, Grand Haven, & Milwaukee Railway*, 122 U. S. 189. So far as risks are obvious pertaining to the apparently permanent features of the business as it is openly conducted, an employer has a right to believe that his employee agrees to assume them. They are, therefore, not included among those to be guarded against in the performance of his general duty to furnish reasonably safe appointments for the employee, and the employer cannot be held guilty of negligence in failing to make provision against them.

In the present case any one opening the door of the chart room would see at a glance that the products of combustion in the stove could not escape except into the atmosphere of the room. The plaintiff was furnished with a state room, and the chart room was not designed to be used as a sleeping room. Moreover, he was warned that a kind of fuel was used in the stove which might be dangerous, and that it was necessary for safety to keep the door open a little way by the hook which was designed to hold it in that position. However much we may sympathize with the plaintiff in his misfortune, a majority of the court are of opinion that the defendant owed him no duty to change the construction of its chart room, or of the stove by which the room was heated, and that when he entered the service he voluntarily assumed the risk of such an accident as befell him.

It is not contended that there can be a recovery for the negligence of a fellow servant in closing the door, instead of fastening it a little way open by the hook. *Exceptions overruled.*

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JAMES D. MORRISSEY *vs.* JOHN MULHERN, executor.

Suffolk. March 10, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Husband — Married Woman — Separate Estate — Funeral Expenses.

A husband, having paid the funeral expenses of his wife, who has left property, may recover them of her executor.

CONTRACT, upon an account annexed, for the expenses of the funeral of Catherine J. Morrissey, the defendant's testatrix. Writ dated January 18, 1896.

At the trial in the Superior Court, before *Lilley*, J., there was evidence tending to show that Catherine J. Morrissey, who was the wife of the plaintiff, died on October 14, 1893; that she had been living apart from him for two weeks previous to her death; that she made her will on October 2, 1893, while living apart from him, in which, after providing for the payment of her debts and funeral expenses, she left her husband what he would be entitled to had she left no will; that she left the balance of her property to her five minor children; that upon the day of her death the plaintiff went to one Doyle, an undertaker, and ordered the funeral; that the expenses thereof were $200; that the plaintiff was sued by Doyle for that sum, and interest, and judgment was rendered for Doyle for the sum of $215.40, in the Superior Court, and execution issued thereon; that Morrissey paid the execution before bringing this action; and that Morrissey visited his wife while apart from him, and also on the day of her death.

It was agreed that a reasonable amount for the funeral expenses was $224.97; that the executor had funds belonging to the wife's estate in his hands, sufficient to pay the same; that the will was probated on January 11, 1894; that the defendant filed a bond as executor on January 18, 1894; that the plaintiff told the undertaker to charge the bill to him; and that the plaintiff had, and knew he had, sufficient property of his own to pay the funeral expenses when he ordered the funeral. The plaintiff

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testified that he went back to the undertaker within twenty minutes after he ordered the funeral as aforesaid, and told the undertaker to charge nothing to him, and that he so testified in the action of *Doyle* v. *Morrissey* aforesaid, and that at the time his wife left him she was out of her mind.

The judge directed a verdict for the plaintiff for the sum of $224.97; and the defendant alleged exceptions.

A. D. Moran, for the defendant.

D. E. Gould & R. Lund, (*C. H. Welch* with them,) for the plaintiff.

FIELD, C. J. We cannot distinguish this case from *Constantinides* v. *Walsh*, 146 Mass. 281. *Exceptions overruled.*

WILLIAM U. SHERWIN & others, trustees, *vs.* SAMUEL W. FLETCHER.

Middlesex. March 10, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Validity of Subscription to Agreement before Withdrawal by Subscriber — Consideration.

A written agreement to subscribe money for the erection of a building, signed by A. and others, which agreement is virtually a promise to pay to such person or persons as shall be fixed at a meeting of the subscribers, is at the outset an offer; but when steps are taken in pursuance of a provision thereof that the details of the plan of organization and erection of the building shall be determined by a majority in number and interest of the subscribers at a meeting duly called for the purpose, and a plan is determined as therein provided and trustees are chosen, they become the promisees, and when they proceed to erect a building in reliance upon the subscriptions of A. and others, and before any withdrawal or retraction by A., that supplies a good consideration, the promise becomes valid, and A. is bound by his subscription.

CONTRACT, on the following agreement.

"We, the undersigned subscribers, do hereby agree to pay the sum set against our respective names, the same to be pay able under and in accordance with the following conditions, namely:

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"1. The money by us subscribed is to be used for the purpose of erecting a building in the town of Ayer, to be used for the manufacture of boots and shoes.

"2. The details regarding the plan under which the subscribers hereto shall organize themselves, and upon which said building shall be erected and rented, shall be hereafter fixed and determined by a majority in numbers and interest of the subscribers hereto, at a meeting to be duly called for that purpose.

"3. No subscription hereto, shall be binding, until the sum of twelve thousand (12,000) dollars shall have been raised.

"Samuel W. Fletcher. $200."

The declaration alleged that the defendant signed the above contract, (a copy whereof was annexed,) and thereby agreed, in consideration of other parties signing similar agreements, to pay to such person or persons as should be determined upon by the majority in numbers and interest of such subscribers the sum of two hundred dollars, upon the terms and conditions therein specified and set forth; that the sum of twelve thousand dollars was subscribed; that at a meeting of such subscribers duly notified and called for that purpose, it was determined by a majority in numbers and interest of the subscribers to organize, and they did so organize under the name of the "Ayer Building Association"; that the plaintiffs were duly chosen trustees, and by votes of said association were duly authorized and empowered to purchase a tract of land in the town of Ayer, and erect thereon a building for the manufacture of boots and shoes, and to collect all subscriptions; that, relying upon the promise of the defendant, and being so authorized as aforesaid, they did purchase a tract of land in the town of Ayer and erect thereon a building for the manufacture of boots and shoes, and demanded of the defendant the amount of his said subscription, to wit, the sum of two hundred dollars, but the defendant refused and still refuses to pay the same.

The defendant demurred to the declaration, assigning as grounds therefor: 1. That it did not appear by said declaration and the contract annexed thereto that the defendant made any promise or agreement to pay the plaintiffs, or any promise or agreement upon which the plaintiffs were entitled to recover; 2. That the plaintiffs did not allege in their declaration, nor did

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it appear by the contract, that there was any sufficient consideration for the defendant entering into the contract.

The Superior Court overruled the demurrer; and the defendant appealed to this court.

J. M. Maloney, for the defendant.

W. H. Atwood, for the plaintiffs.

ALLEN, J. The demurrer to the declaration was rightly overruled. The written agreement signed by the defendant was virtually a promise to pay to such person or persons as should be fixed at a meeting of the subscribers. This promise was at the outset an offer, but when steps were taken in pursuance of Article 2, and a plan was fixed and determined as therein provided, and the plaintiffs were chosen trustees, they became the promisees; and when they proceeded to erect a building in reliance upon the subscriptions of the defendant and others, and before any withdrawal or retraction by him, that supplied a good consideration, and the promise became valid and binding in law. *Athol Music Hall Co.* v. *Carey*, 116 Mass. 471. *Davis* v. *Smith American Organ Co.* 117 Mass. 456. *Cottage Street Church* v. *Kendall*, 121 Mass. 528. *Hudson Real Estate Co.* v. *Tower*, 156 Mass. 82; *S. C.* 161 Mass. 10. *Judgment affirmed.*

JOHN S. TUCKER & others *vs.* JOHN H. UTLEY & others.

Suffolk. March 13, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Action — Surviving Defendant — Commission to take Depositions — Evidence — Contract — Usage.

If, pending an action against several defendants sued on a joint contract, one of them dies, a ruling that the action may proceed against the survivor is correct.

It is not necessary that the name of the magistrate should be inserted in a commission to take depositions issued under Pub. Sts. c. 169, § 40, if there is a proper designation by official title of the person who may take the deposition.

It is no defence to an action for money had and received by a commission merchant, from the sale of merchandise forwarded to him in the ordinary course of business, that he had some reason to suspect that it belonged to the L. Co., which did business in the former year and sent similar merchandise to him from the same place from which the plaintiff's merchandise was sent; that the ac-

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companying drafts were made payable to the same person in whose favor drafts were drawn the year before by the L. Co., and were in the same handwriting; that the mark on the merchandise to designate the consignee indicated a succession to the rights of the L. Co., because, as against the proprietorship truly asserted by the plaintiff's business name in which the merchandise was sent, it had no tendency to contradict the plaintiff's claim of title; that the defendant heard from commercial agencies and from those in the vicinity of the place from which the merchandise was sent that the business was being there carried on in the same manner and by the same parties as in 1889; and that there was a usage for persons whose merchandise of this particular kind did not sell well to change their business name and conceal their identity to mislead the public and avoid the consequences of a bad reputation.

CONTRACT, by John S. Tucker, C. J. Weiser, and Ben Bear, doing business in Lake Benton, in the State of Minnesota, under the name of the North Star Creamery Company, to recover the proceeds of sales of butter forwarded by them to the defendants. Trial in the Superior Court, before *Hammond*, J., who directed a verdict for the plaintiffs; and the surviving defendant alleged exceptions, the nature of which appears in the opinion.

W. E. Jewell, for the surviving defendant.

C. W. Clark, for the plaintiffs.

KNOWLTON, J. The ruling that the action might proceed against the surviving defendant was correct. Pub. Sts. c. 165, §§ 12, 13. *New Haven & Northampton Co.* v. *Hayden*, 119 Mass. 361. *Ricker* v. *Gerrish*, 124 Mass. 367. *Colt* v. *Learned*, 133 Mass. 409.

The depositions were rightly admitted. It is not necessary that the name of the magistrate should be inserted in the commission if there is a proper designation by official title of the persons who may take the deposition. The form used in this case was in accordance with the rule of the Superior Court, made under the provisions of Pub. Sts. c. 169, § 40, and was approved in *McKinney* v. *Wilson*, 133 Mass. 131. Presumably the commission was issued under a rule of the Municipal Court or an order of a judge of that court.

The defendants were commission merchants, and were accustomed to receive butter and sell it on commission for the owners. It appears by the auditor's report that they received the plaintiffs' butter, forwarded in the ordinary course of business, and sold it and received the pay for it, and that they have a large balance of money which they have declined to pay over. On

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these facts, they are liable in this action for money had and received unless something appears that entitles them to retain the money. Facts were found by the auditor, and evidence was offered to prove other facts, which gave the defendants some reason to suspect that the property belonged to the Lake Benton Creamery Company, which did business in the former year and sent butter to the defendants from the same place from which the plaintiffs' butter was sent, but none of these facts affects the title of the plaintiffs, or their right to have the proceeds of the butter which they sent in their own names in the ordinary way. The fact that the accompanying drafts were made payable to the same persons in whose favor drafts were drawn the year before by the Lake Benton Creamery Company was of no significance, and does not affect the plaintiffs' rights. That they were in the same handwriting merely indicated that they were prepared by some one representing the payees, who were bankers. The mark on the tubs of butter to designate the consignees indicated a succession to the rights of the Lake Benton Creamery Company, but as against the proprietorship, truly asserted by the plaintiffs' business name in which the butter was sent, it had no tendency to contradict the plaintiffs' claim of title. What the defendants heard from commercial agencies was untrue, and it is not competent evidence against the plaintiffs, but is mere hearsay.* All that remains is the offer to prove a usage for persons whose butter did not sell well to change their business name and conceal their identity to mislead the public and avoid the consequences of a bad reputation. If such a usage exists, it cannot be availed of by any one relying upon it to deprive an honest man of his property. It is not a usage with which the plaintiffs had any connection, and it does not recommend itself to the favorable consideration of the court. It does not affect the rights of the plaintiffs in this action. *Whitmore* v. *South Boston Iron Co.* 2 Allen, 52. *Snelling* v. *Hall*, 107 Mass. 134. *Davis* v. *Galloupe*, 111 Mass. 121. *Commonwealth* v. *Cooper*, 130 Mass. 285. *Hedden* v. *Roberts*, 134 Mass. 38.

* The bill of exceptions recited that "the defendants made inquiries and received intelligence from the vicinity of Lake Benton and from well known mercantile agencies that the creamery business was being carried on at Lake Benton in the same manner and by the same parties as in 1889."

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The defendants received the property as belonging to the North Star Creamery Company, in which name the plaintiffs were doing business. They were bound to account for the proceeds to the North Star Creamery Company. If they suspected that this was merely another name for the Lake Benton Creamery Company, the plaintiffs were not responsible for that suspicion, and the defendants took their chance as to who the parties were, and must account with them according to the fact.

Exceptions overruled.

LYMAN HOWE & others *vs.* JOHN K. BERRY, trustee.

Norfolk. March 15, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & LATHROP, JJ.

Interest of Husband in Wife's Lands when they have had no Children.

The Pub. Sts. c. 124, § 1, give a fee to an amount not exceeding five thousand dollars in value to a husband in his wife's lands, when they have had no children.

PETITION to the Probate Court, by the heirs of William J. Howe, to have set off to them real estate in Randolph to the value of five thousand dollars, formerly belonging to Abigail T. Howe, his wife. The judge of probate entered a decree that "William J. Howe died seised of an estate in fee not exceeding five thousand dollars in value in the real estate of said Abigail T. Howe, deceased, and that these petitioners, as heirs at law of said William J. Howe, are entitled to such estate in fee in said real estate"; and the respondent appealed to this court.

Hearing, before *Allen*, J., who ordered a decree to be entered affirming the decree of the Probate Court. The respondent appealed to the full court. The facts appear in the opinion.

J. K. Berry, pro se.

A. P. French, for the petitioners.

HOLMES, J. The respondent is trustee under the will of Abigail T. Howe. She died before her husband, and he, never having consented to the will, waived its provisions. They had

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no children. The respondent contends that, as they had had no issue born alive, William J. Howe was cut off by the will from everything but a life estate in one half of his wife's lands. By Pub. Sts. c. 147, § 6, as amended by St. 1885, c. 255, § 1, a married woman may make a will as if sole, except that without her husband's written consent the will is not to deprive him of his curtesy or his statutory life estate, or by the further amendment of St. 1887, c. 290, § 2, "of her real estate not exceeding five thousand dollars in value, when no issue survives her." The argument is that the word "survives" imports that issue must have been born, although it does not live beyond its parent, and then this interpretation of the act of 1887 is applied to Pub. Sts. c. 124, § 1, by which the right to the five thousand dollars' worth of land is created, in order to determine in what cases that right is given.

The trouble with the argument is that it begins at the wrong end. The saving clause of the later act of 1887 must be construed by the earlier act creating the right which is saved, not the earlier by the later. By Pub. Sts. c. 124, § 1, as amended by St. 1887, c. 290, § 1, "If she dies and leaves no issue living, he shall take her real estate in fee to an amount not exceeding five thousand dollars in value, and shall also have an estate by the curtesy or other life interest, as before provided, in her other real estate." It will be observed that here the word is "living" not "surviving." Furthermore, the words "or other life interest" refer to an immediately preceding provision made for the husband if they have had no issue born alive, so that it is plain on the face of the section that it is not necessary to have had children in order to get the five thousand dollars' worth in fee, since one who takes this "other life interest" may have it. Our construction is confirmed, if confirmation is needed, by the original statute, St. 1880, c. 211, § 1, where the provision in question is enacted independently of the matters with which it has been connected in the compilation, and by *Cochran* v. *Thorndike*, 133 Mass. 46, 48. In *Eastham* v. *Barrett*, 152 Mass. 56, it appears from the exceptions that the husband and wife had had no children. So in *Lincoln* v. *Perry*, 149 Mass. 368, 370, 374.

An objection taken to the form of the decree is not much pressed. It is agreed that the adjudication that "William J.

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Howe died seised of an estate in fee not exceeding five thousand dollars in value," etc., means an estate of that value, where, as here, the land of the wife was worth more than that amount. In substance it is right. *Decree affirmed.*

HORACE B. SARGENT, JR., administrator, *vs.* HOWARD SARGENT.

Suffolk. March 16, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & LATHROP, JJ.

French Spoliation Claims — Probate Court — Appointment of Administrator and Settlement of Accounts.

Where there is property or a fund or right of action which cannot otherwise be made available, it is competent for the Probate Court to appoint an administrator for the sole purpose of collecting and receiving assets which will not be general assets of the estate of his intestate, or liable for his debts, but which will belong to particular persons who by law or by contract with the deceased will be entitled thereto, and it is also competent for that court to entertain jurisdiction of the settlement of the accounts of such administrator; at least when he has not been called to account by other judicial proceedings instituted before the jurisdiction of the Probate Court for this purpose is sought.

APPEAL, by one of the next of kin of Daniel Sargent, from a decree of the Probate Court allowing the account of the administrator of Sargent's estate, on the ground that the Probate Court had no jurisdiction of the matter, and no authority to allow the account.

Hearing before *Holmes*, J., who reserved the case, on an agreed statement of facts, for the consideration of the full court. If the Probate Court had no jurisdiction, its proceeding in allowing the account was to be set aside; if it had jurisdiction, its allowance of the account was to be affirmed, and the case was to be remitted thereto for further proceedings. The facts appear in the opinion.

G. A. King, for the appellant.

G. C. Dickson & C. S. Knowles, for the appellee.

ALLEN, J. The administrator was appointed for the purpose of presenting and collecting a claim for French spoliations, and

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in that capacity he received the amount of an award, under U. S. St. of March 3, 1891, 26 U. S. Sts. at Large, 862, 908, for which he has sought to account in the Probate Court as administrator, and to have the amount of his reasonable charges and expenses ascertained and deducted. The question relates only to the form in which the duty of the administrator to pay over the money to those entitled may be enforced.

It often happens that an executor or administrator may receive money which is not to be treated as general assets of the estate of his testator or intestate, and is not liable to be applied to the payment of debts, but is to go to some particular persons, as, for example, to the widow or next of kin. The question whether in such cases he may or should settle his accounts in respect to such funds in the Probate Court, or whether the remedy in case of need is to be sought exclusively by other forms of judicial proceedings, is of some practical importance.

In *Gould* v. *Emerson*, 99 Mass. 154, an administrator had recovered from an insurance company the amount of a policy of life insurance, which was expressed to be for the benefit of the widow and child of the assured, and had refused, upon demand, to pay to the child any part thereof; and it was held that he was liable in an action for money had and received, and that he was entitled to deduct, out of the money collected, his expenses of collection, which might include the expenses of taking out administration, if that was the only estate of the deceased in this Commonwealth. The decision in *Fogg* v. *Perkins*, 19 N. H. 101, is to a similar effect. In *Rindge* v. *New England Mutual Aid Society*, 146 Mass. 286, it was said that under such circumstances an administrator might be compelled to dispose of such funds properly by judicial proceedings, without going into the question of the proper form of such proceedings. See also *Daniels* v. *Pratt*, 143 Mass. 216.

It does not follow from the doctrine of the above decisions that the remedy, in such a case, by an action or other proceedings against the administrator personally, is the exclusive one. It was held otherwise in *De Valengin* v. *Duffy*, 14 Pet. 282. In that case, De Valengin was the ostensible owner of a cargo, which in reality was owned by Duffy, and, the cargo having been captured by a Brazilian cruiser, and De Valengin having died,

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his administrator obtained compensation for the cargo from the Brazilian government. Duffy sued the administrator for the money. This administrator died, and an administrator *de bonis non* of De Valengin was appointed, against whom Duffy was allowed to prosecute the action, instead of pursuing it against the representatives of the original administrator. The court declared that Duffy might resort to the original administrator in his personal character or in his representative character, at his election; and that where an administrator, by the judgment of a court, recovers money in his representative character, he must account for it in the same character. In that case, it appears to have been considered that the money recovered was assets of the estate of De Valengin in a certain qualified sense, but apparently it was not thought to be liable to be applied to the payment of his debts.

In *Perkins* v. *Perkins*, 46 N. H. 110, a widow was entitled to a Revolutionary pension, and after her death her administrator received arrears due at her death, which by law would be for the benefit of her children. It was held that this money was not assets for the payment of debts or general expenses of administration, but that the administrator took it in trust for the children; and a special decree was entered, charging him with the money so received, deducting therefrom the expenses attending it, and providing that it should be paid directly to the children, with a special view to affording a remedy on the administrator's bond. The court, in a fully considered opinion, said that they could see no reason for holding that he should not be liable on his bond, without which he could not have received his appointment, or have acquired a right to receive the money at all. In this case, as in *De Valengin* v. *Duffy*, it was recognized that the persons entitled might have maintained an action against the administrator personally, instead of holding him responsible in his representative character.

In the recent case of *Clement's estate*, 160 Penn. St. 391, where an administrator had received money upon a French spoliation claim for the next of kin, the court said that the ascertainment of the next of kin to a decedent, for the purposes of distribution, was within the general jurisdiction of the Orphans' Court of Pennsylvania, and that this jurisdiction might be extended

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to include such ascertainment with reference to a fund which, though not a part of the decedent's estate, was, for the purpose of ascertaining who were to take, to be treated as if it were; and the former decision, in *Clement's estate*, 150 Penn. St. 85, upon which the decision in *Leffingwell's appeal*, 62 Conn. 347, chiefly rested, was overruled.

Under a very strict construction of the powers of an executor or administrator, and in the absence of any extension of them by statute, he could only deal with the estate of the deceased, and could indeed only be appointed when there might be such estate to be administered. But this would be so inconvenient in practice that various extensions of these powers have been established, or recognized as existing. In some instances, this has been done by express statute; as where an executor or administrator is allowed to collect rents of real estate, under certain circumstances, and to recover compensation for the death of the testator or intestate for the benefit of his widow or next of kin. In other instances, it is held that an executor or administrator may maintain an action to recover money from a life insurance company or beneficiary association for the benefit of those to whom the money is to go, although no statute expressly authorizes it, because the recovery is had by virtue of a contract with the deceased. Such cases are common and familiar. But in still other instances, an executor or administrator has been allowed in this State and elsewhere to maintain an action for the benefit of a widow or children or next of kin to recover compensation for a death caused in another State by a corporation of such other State, when the only right of action was conferred by the statutes of such other State; and no doubt it would follow that an administrator might be appointed for the sole purpose of bringing such an action. *Higgins* v. *Central New England & Western Railroad*, 155 Mass. 176. *Dennick* v. *Central Railroad*, 103 U. S. 11. *Huntington* v. *Attrill*, 146 U. S. 657, 675. In these cases, the administrator is allowed to recover, not by virtue of any contract with his intestate, or of any express authority given by the statutes of the State where he is appointed, and the amount recovered does not belong to the general assets of the estate. The administrator in the case now before us, no doubt, was appointed for the sole purpose of collecting the money which

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he now seeks to account for, and in other instances which have been before this and other courts, it is probable that the appointments of administrators have been made solely for the same purpose. So far as we know, it has nowhere been deemed necessary to obtain special legislation to authorize the appointment of administrators for the purpose of receiving money from the general government for the benefit of the next of kin; and in *Blagge* v. *Balch*, 162 U. S. 439, 463, the opinion of the court seems to imply that it is not deemed necessary, although the money received is not to be administered as general assets belonging to the estate. In many instances, property and funds are administered by administrators, which are not general assets, but assets only in a qualified sense. Wms. Ex. (7th Am. ed.) 1518. Woerner, Administration, § 305. *Thurston* v. *Doane*, 47 Maine, 79. *Lewis* v. *Carson*, 93 Mo. 587. *Gardner* v. *Clarke*, 20 D. C. 261. In *Balch* v. *Blagge*, 157 Mass. 144, the administrators *de bonis non* of the original sufferer held funds coming from the same source as the funds involved in the present case, and settled their accounts in the Probate Court, and had a balance in their hands, and thereupon, upon a petition by the administrator *de bonis non* of a deceased son of the original sufferer, the Probate Court passed a decree for the payment to him of a portion of the funds; and this decree on appeal was affirmed by this court, no question being raised as to the jurisdiction of the Probate Court to entertain the petition. In *Cronan* v. *Cotting*, 99 Mass. 334, and in *Codman* v. *Brooks*, 159 Mass. 477, 481, language is used which would imply a doubt of such jurisdiction.

But, in view of the foregoing considerations and authorities, where there is property or a fund or right of action which cannot otherwise be made available, in our opinion it is competent for the Probate Court to appoint an administrator for the sole purpose of collecting and receiving assets which will not be general assets of the estate of his intestate, or liable for his debts, but which will belong to particular persons who by law or by contract with the deceased will be entitled thereto, and it is also competent for that court to entertain jurisdiction of the settlement of the accounts of such administrator; at least when he has not been called to account by other judicial proceedings insti-

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tuted before the jurisdiction of the Probate Court for this purpose is sought.

We do not, however, at this time determine whether sureties upon an administrator's bond in the ordinary form would or would not be liable for a failure by the administrator to make distribution according to the order of the Probate Court.

The decree of the Probate Court is therefore to be affirmed, and the case remitted to that court for further proceedings.

So ordered.

SHAWMUT NATIONAL BANK *vs.* GILBERT MANSON & others.

Suffolk. March 16, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Check — Bona Fide Holder for Value.

A check deposited with a bank on the day of its date cannot be considered as overdue when so deposited.

If a bank receives a check from the payee, who indorses it, and the bank credits the amount thereof to the payee in his account as depositor, and permits the payee to draw against it before it receives notice through the clearing-house that the check has been dishonored, the bank must be regarded as a *bona fide* holder for value.

CONTRACT, upon a check, for $892.50, signed by the defendant Manson, payable to the order of and indorsed by the defendants A. D. Pennycuick and Company, dated December 21, 1895, and containing under the name of the indorser the words, "Endorsement guaranteed. Pay only through Clearing House to Shawmut National Bank, Boston. J. C. Tufts, Cashier."

The defendants Pennycuick and Company filed a general denial, but did not appear at the trial. The defendant Manson filed a general denial, and also set up that the check was tainted with illegality, in that it was given in settlement of margins on stock; that the contract was contrary to the provisions of Pub. Sts. c. 78, and St. 1890, c. 437; that except as aforesaid there never was any value or consideration for the making of the check by the defendant, and the plaintiff was not a *bona fide*

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holder for value; that the payee as part of the contract agreed to hold the check and not to use it, but to return it to the defendant should the payee continue in the business of stock buying, and not be obliged to make an assignment or be put into insolvency; that the payee parted with the check contrary to this agreement, and in fraud of the defendant Manson's rights; and that the plaintiff was not a *bona fide* holder for value.

Trial in the Superior Court, without a jury, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff having introduced the check, the defendant Manson introduced evidence tending to support the defence alleged in the answer, of fraud and illegality. The plaintiff then, by its paying teller and bookkeeper, showed that the check in suit was deposited with it in the ordinary course of business, and without any special understanding or agreement regarding the same, on Saturday, December 21, 1895, and was then passed on the books of the bank to the credit of Pennycuick and Company; that the check went through the Clearing House and was presented to the bank on which it was drawn on Monday, December 23, when it was refused payment, and returned to the plaintiff; that on the opening of the day's business on December 21, there was standing to the credit of Pennycuick and Company a balance of about $68; and that on Monday, December 23, and before the check was returned to the plaintiff, Pennycuick and Company presented their own check for $1,000, which the paying teller, not knowing that the check in suit had been dishonored, paid. The paying teller testified further, that, according to the usage prevailing between banks and their depositors, checks deposited with them were credited to the depositor and forwarded through the Clearing House for collection, and that the depositors were not entitled to draw against the deposits until such checks had been paid; that in this case there was no special understanding regarding the check in suit, that it had not been treated differently from any other checks deposited in the usual course of trade, and that, at the time the $1,000 draft was paid, the teller understood there was that amount to Pennycuick and Company's credit. There was also evidence tending to show that the plaintiff bank was a

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member of the Clearing House Association, according to whose written constitution it was provided "that they, the said banks, receive checks and items payable by other banks for collection as agents only, and do not hold themselves liable for any loss or damage which may accrue through the default of any bank or banks upon which said checks and other items may be drawn."

The defendant asked the judge to rule:

"1. If the check in suit was given in settlement of margins, the check was tainted with illegality. 2. If the defendants Pennycuick & Co. were to hold the check, and, contrary to agreement, put it in circulation, the check was tainted with fraud. 3. The deposit of the check in suit being made without any special agreement, it must be treated as made in the usual course of business, and the plaintiff was the holder simply as an agent for collection, and not as a purchaser. 4. The fact that the plaintiff bank paid out on December 23 a sum in excess of the amount of the check, does not make it a holder for value. 5. The plaintiff has no case against Manson, on all the facts as stated."

The judge refused so to rule, and ruled: "Without passing upon the question of fraud or illegality, I find the plaintiff is a *bona fide* holder for value."

The judge found for the plaintiff; and the defendant Manson alleged exceptions.

E. B. Callender, for the defendant Manson.

W. B. French, for the plaintiff.

FIELD, C. J. The finding of the court, that "the plaintiff is a *bona fide* holder for value," renders the first two requests of the defendant Manson for rulings immaterial. The check was deposited with the plaintiff on the day of its date, and therefore cannot be considered as overdue when it was taken by the plaintiff. See *Ames* v. *Merriam*, 98 Mass. 294; *First National Bank of Rochester* v. *Harris*, 108 Mass. 514; *Bill* v. *Stewart*, 156 Mass. 508.

The plaintiff received the check from the payees, who indorsed it, and credited the amount of the check to the payees in their account as depositors, and permitted the payees to draw against it before it received notice through the Clearing House that the check had been dishonored. This made the bank a holder for

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value, and there is no doubt that the evidence sustains the finding that the bank received the check in good faith. See *Fulton National Bank* v. *Gosline*, *ante*, 86.

Exceptions overruled.

HERBERT E. DENNETT & another *vs.* EDMUND D. CODMAN & others.

Suffolk. March 22, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Mortgage — Equity — Remedy — Action.

If a mortgagor of land brings a bill in equity to redeem it from the mortgage, offering to pay the amount found due thereon, and to set aside a foreclosure sale, upon which a decree is entered granting the relief sought and giving him a certain time in which to redeem, the remedy so obtained is full and adequate, and if he fails to avail himself of it he cannot afterwards maintain an action against the defendant for conspiracy to defraud him of the land, and fraudulently to foreclose the mortgage.

TORT, for slander of title and conspiracy to defraud the plaintiffs of certain land in Belmont, and fraudulently to foreclose a mortgage thereon. Trial in the Superior Court, before *Blodgett*, J., who ruled that the action could not be maintained, and directed the jury to return a verdict for the defendants; and the plaintiffs alleged exceptions. The facts material to the point decided appear in the opinion.

M. L. Sanborn, for the plaintiffs, submitted the case on a brief.

C. K. Cobb, for the defendants Edmund D. and Robert Codman, Jr., also submitted the case on a brief.

M. Storey, for other defendants.

KNOWLTON, J. The plaintiffs abandoned their counts for slander of title, and left the case to stand on their allegations of conspiracy to deprive them of a parcel of land, and fraudulently to foreclose a mortgage upon it. There is no evidence that the defendants, or either of them, did anything that they had not a right to do, or that they resorted to any illegal means to do anything, unless it be in the foreclosure of the mortgage under the power of sale.

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If we assume in favor of the plaintiffs that the jury might have found such negligence or misconduct on the part of the defendants in making the sale as would render the sale invalid, it does not appear that the plaintiffs have suffered from it. They saw fit to bring a bill to redeem the land from the mortgage, as they might have done if no sale had been made, and they offered in it to pay the defendants what should be found due on the mortgage. In this bill they sought a remedy for the alleged wrong that had been done them in the proceedings to foreclose, by asking for a decree which should set aside the sale. They obtained the relief which they sought, through a decree which left their rights as if no sale had ever been made. They were dissatisfied with the decree, and appealed therefrom on the ground that it required them to redeem within a time stated, namely, within forty-five days from the entry of the decree, when, as they contended, it should have permitted redemption "at any time before a valid and effectual foreclosure of said mortgage by a new execution of the power of sale therein, or otherwise." But this court overruled their contention and affirmed the decree. *Dennett* v. *Codman*, 158 Mass. 371. After the decision on the appeal, they still had forty-five days within which to redeem the property, but they failed to redeem it at any time. The remedy which they obtained on their bill in equity was full and adequate. Their right of redemption was defined by the court, as is usual in such cases, and they were left without injury from the foreclosure of which they complained. They lost their land, not by reason of the foreclosure, but because of their failure to redeem it within the time allowed them by the court. Having elected their remedy, and having obtained full satisfaction, which failed to be beneficial to them only through their misfortune or neglect, there is nothing left upon which they can found a claim for damages. The ruling directing a verdict for the defendants was correct.

In the view which we take of the case, the memorandum of the justice who heard the parties in equity was immaterial.

Exceptions overruled.

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UHLAND CLUB *vs.* ERNEST SCHUPBACH & another.

Suffolk. March 23, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Damages of Leaseholder for Property taken by Right of Eminent Domain.

A lessee of real estate, which has been taken by a railroad company under the right of eminent domain, cannot, after his remedy against the company has been barred by lapse of time, maintain an action against the lessor to recover a part of the sum paid to him by the railroad company when the lessor, acting for himself alone, settled an action for damages brought by him against the railroad company, and gave to it a deed of the property previously taken.

CONTRACT, for money had and received by the defendant to the use of the plaintiff, with a second count for breach of the covenants of a lease. Writ dated October 19, 1895.

At the trial in the Superior Court, before *Sheldon*, J., there was evidence tending to show that when the action was commenced the plaintiff was a lessee of the defendants, under a written lease for three years from January 1, 1893, of a portion of certain premises in Boston, which, on June 23, 1894, were taken by the Old Colony Railroad Company under the right of eminent domain; that on June 21, 1895, the defendants filed a petition in the Superior Court for the assessment of damages caused by such taking, and, not long thereafter, they gave to the railroad company a deed of the land so taken, and received the sum of $10,250 in settlement of their claim; and that in the course of the settlement no mention was made by them of any claim against the railroad company by their tenants. There was also evidence tending to show that in the early part of July, 1895, in conversations between the defendant Schupbach and members of the plaintiff club, the latter expressed their intention of taking independent measures for the recovery of damages for the interruption of their lease. This was all the material evidence in the plaintiff's case, and at its close the judge, at the request of the defendants, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendants. The plaintiff alleged exceptions.

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E. H. Savary, for the plaintiff.

W. I. Badger, (*F. P. Sears* with him,) for the defendants.

KNOWLTON, J. The plaintiff had a leasehold interest in the defendants' real estate, which was taken by the Old Colony Railroad Company by special authority of the Legislature under the right of eminent domain. The plaintiff might have made a claim against the railroad company for damages for being deprived of its rights under the lease, and in that case, in the absence of an agreement, its damages, if any, would have been assessed with those of the defendants in accordance with the provisions of Pub. Sts. c. 49, §§ 18, 19, and St. 1883, c. 253. No such claim was made by the plaintiff, and the claim of the defendants, which was pending on a petition filed in the Superior Court, was settled by the railroad corporation by paying an agreed price on the receipt of a deed of the property subject to the previous taking. At that time the right of the plaintiff to prosecute its claim for damages had expired by limitation. Its lease had less than six months longer to run, and if it be assumed that there was a possibility of reverter to the original owners upon a termination of the franchise of the railroad company, and an abandonment of the use for which the property was taken, there was nothing more than a technical possibility that this would happen within the six months. The defendants in collecting their claim were not in fact acting, and did not profess to be acting, for the plaintiff, whose claim had been barred by lapse of time. In making their deed they conveyed little, if anything, of value, inasmuch as the property had previously passed by a taking for a public use which was almost certain to be perpetual. Certainly it conveyed nothing of any value from the plaintiff's leasehold estate. There was no legal or equitable relation between the plaintiff and the defendants in this transaction, and no part of the money received by the defendants belonged to the plaintiff.

This conclusion might be reached on another ground. The evidence introduced by the plaintiff showed that the rental value of its estate was only the same as the rent reserved by the lease, and that the plaintiff therefore suffered no actual damage which could have been recovered on account of the taking.

Exceptions overruled.

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LYSANDER N. PAINE & another *vs.* JOSEPH S. SILVA.

Suffolk. March 23, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Contract — Equity — Co-owners of Fishing Vessel.

In an action of contract against one of two owners of a vessel to recover for necessary supplies furnished for a fishing voyage, it appeared that as to a portion of the account the defendant personally ordered the articles and directed them to be charged to the vessel; that the rest seemed to have been furnished upon the master's orders, at the request of the defendant or of an agent of the two owners, and that the owners remained in control of the vessel, which was sailed on a certain lay, by which the master received a commission from the proceeds of the fish caught, and then, subject to certain other deductions, the proceeds were divided between owners and crew in a fixed proportion. *Held*, that the action could be maintained.

CONTRACT, against one of two owners of the schooner Gertie Winsor, to recover for necessary supplies, mainly rigging and fishing gear, furnished for a fishing voyage. Trial in the Superior Court, before *Lilley*, J., who directed a verdict for the defendant; and the plaintiffs alleged exceptions, the nature of which appears in the opinion.

E. P. Carver, for the plaintiffs.

W. A. Morse & W. W. Stover, for the defendant, submitted the case on a brief.

HOLMES, J. The defendant was one of two owners, but the non-joinder of the other is not pleaded in abatement, and is not relied on. *Wilson* v. *Nevers*, 20 Pick. 20. *Edler* v. *Thompson*, 13 Gray, 91. It is suggested that the suit ought to be brought in equity, but of course the rule laid down in cases like *Smith* v. *Butler*, 164 Mass. 37, as to proceedings between part owners, has no application to a suit by a stranger to the vessel upon an independent contract.

The only question open to argument is whether the defendant was a party to the contract. As to a portion of the account, the defendant personally ordered the articles, and directed them to be charged to the vessel. The rest seems to have been furnished upon the master's orders, at the request of the defendant, or of an agent of the two owners. It would be going a great way to say that such a request coming from the general owners did not

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purport to invite a contract with them personally, even if the vessel were let to other persons as owners *pro hac vice*, as in *Baker* v. *Huckins*, 5 Gray, 596, and *Rich* v. *Jordan*, 164 Mass. 127, at least for the necessary rigging of the vessel. See *Whitcomb* v. *Emerson*, 50 Fed. Rep. 128; *Swift* v. *Hall*, 121 Mass. 278. But in the case at bar there was no such letting. The general owners remained in control of the vessel. There is nothing to qualify that conclusion in the fact that the vessel was sailed on what is called the Provincetown lay, by which the master receives a commission from the proceeds of the fish caught, and then, subject to certain other deductions, the proceeds are divided between owners and crew in a fixed proportion. *Noyes* v. *Staples*, 61 Maine, 422. The case therefore stands on ordinary grounds of contract, the evidence of the requests made by and on behalf of the defendant, and also of the defendant's admissions, warranting the inference that he and his co-owner purported to make themselves primarily liable.

Exceptions sustained.

EMMA INNESS, administratrix, *vs.* BOSTON, REVERE BEACH, AND LYNN RAILROAD COMPANY.

Suffolk. March 23, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Loss of Life — Negligence — Passenger — Evidence — Question for Jury.

At the trial of an action against a railway company, under Pub. Sts. c. 112, § 212, for causing the death of the plaintiff's intestate, a passenger, by the gross negligence of the defendant's servants, there was evidence tending to show that he had just gone up the steps and reached the platform of a car when the train of which the car was a part, and which had been delayed by snow, was run into by a later train, and the intestate was thrown off and killed. His general practice was to travel by a street railway, and it was contended that it was as likely that he was crossing the platform on his way to the electric cars as that he intended to go by steam, and it did not appear that he had a ticket or the money to pay for one. No electric cars were running at the time because of the snow storm. There was testimony that the street railway could be seen from the intestate's house, and that less than a quarter of an hour before the accident he looked out in the way he always did to see if the electric cars were there, and then left in a hurry, saying that he was going to take the train, as there were no

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electric cars running. The judge directed a verdict for the defendant. *Held*, that the intestate's statement was admissible, that he was a passenger, and that the case should have been submitted to the jury.

TORT, under Pub. Sts. c. 112, § 212, for causing the death of the plaintiff's intestate, a passenger, by the gross negligence of the defendant's servants. Trial in the Superior Court, before *Maynard*, J., who, at the close of the evidence, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

E. O. Shepard, for the plaintiff.

W. I. Badger, (*H. W. Ogden* with him,) for the defendant.

HOLMES, J. There was evidence that the intestate had just gone up the steps and reached the platform of a car, when the train of which the car was a part, and which had been delayed by snow, was run into by a later train, and he was thrown off and killed. The question argued is whether there was any evidence that he was a passenger at the time. The train upon which, according to the evidence mentioned, he had just entered, was bound for Boston, his destination. It was at rest, and of course if he had reached the platform on his way into the car he had got far enough to have the rights of a passenger, so far as his position is concerned. But it is urged that his general practice was to travel by a street railway, and that, on the evidence properly admitted, it is as likely that he was crossing the platform on his way to the electric cars as that he intended to go by steam. It also is argued that, as it does not appear that he had a ticket or the money to pay for one, it does not appear that he had the rights of a passenger, whatever his intent.

At the time of the accident, no electric cars were running because of a snow storm. There was testimony that the street railway could be seen from the intestate's house, and that less than a quarter of an hour before the accident the intestate looked out in the way he always did to see if the electric cars were there, and then left in a hurry, saying that he was going to take the train, as there were no electric cars running. The admission of this statement was excepted to, but was proper. If either his intent or his belief that no electric cars were running was material, his statement at a moment when he had no interest to make evidence was admissible to show the state of his mind, within

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the established exception to the rule against hearsay. *Commonwealth* v. *Trefethen*, 157 Mass. 180. Clearly his belief, especially when shown to have been correct, was material, as it would have the taking of the steam cars for its natural consequence, and so would show the probable intent with which he got upon them. His intent so shortly before the act to be interpreted, being in accord with what was to be expected from his belief, also was admissible, and might have been presumed to continue, as indeed it might have been found to exist without direct evidence.

We have nothing to do with the credibility of the testimony for the plaintiff. That must be left to the jury. But we have said enough to show that there was a case for them, unless the plaintiff was bound to put in evidence that the intestate had a ticket or was able to pay his fare. He went to Boston daily, he knew that he could not go for nothing, and it may be presumed that he knew whether he could pay or not. It also may be presumed that he took the train with lawful intent, when nothing in his manner of boarding the train or the other facts raises a doubt. It is not necessary that a man should have bought a ticket in order to be a passenger, either at common law or within the meaning of the statute under which this action is brought.

Exceptions sustained.

HOLLISTER D. DODGE *vs.* MARGARET H. HALL.

Suffolk. March 23, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Mechanic's Lien — Description of Land — Effect of Inaccuracy — Conveyance of Land during Continuance of Contract — Realty and Personalty — Identity of Boundary — Amendment of Petition.

The sufficiency of the description of the land in a petition to enforce a mechanic's lien thereon is rightly left to the jury, and a description is sufficient which will enable one who is familiar with the locality to identify the land with reasonable certainty; and inaccuracies will not vitiate the lien if the land can be so identified.

Where a petition to enforce a mechanic's lien alleges, just preceding the description of the land, that the land was owned by A. and B. when the labor was fur-

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nished, while it is an undisputed fact that they were never joint owners of the land, if this is treated as a matter of description, it is merely an inaccuracy which is not fatal.

If the labor for which a mechanic's lien is sought to be enforced is performed and furnished under a contract with the owner of the land when the contract is made, by the terms of which he employs the petitioner generally to perform and furnish the labor necessary for the construction of the house on the land, and promises to pay him a fair and reasonable price therefor, a conveyance of the land by the owner while the work is going on will not defeat the lien, but it will continue until all that is called for by the contract has been done.

The sills of a house rested on eighteen cedar posts driven from twenty-four to thirty inches into the ground and cut off about four feet above the ground, and were cornered and spiked together with wire nails about four inches in length, and were also fastened to the posts by long wire nails. The chimney was set eighteen inches into the ground and extended up through the house, which was not plastered to the chimney. There was no cellar under the house; and part only of the turf under the house was removed. *Held*, upon a petition to enforce a mechanic's lien, that the house was real estate.

The description of land, in a petition to enforce a mechanic's lien thereon, as bounded on G. Street, will be satisfied, to a reasonable intent, by proof that the street is known as G. Street, whether that is the true name of the street or not.

Under Pub. Sts. c. 191, § 20, it is within the power of the Superior Court to allow an amendment of a petition to enforce a mechanic's lien, by changing the allegation of a contract for labor and materials to one for labor only.

PETITION, to enforce a mechanic's lien, under Pub. Sts. c. 191. The petition alleged that, on or about July 16, 1894, the petitioner made a contract with Charles E. Hall, by the terms of which the petitioner was to build a house for Hall, who "promised to pay him what his labor performed and furnished and materials were worth"; that the petitioner had fully performed his part of the contract; that the land on which the house stands was, at the time of making the contract, owned by Hall, and when the labor and materials were performed and furnished by the petitioner the land was owned by Hall and the respondent; that the land was situated on Garfield Avenue, in Revere, and was bounded and described as follows: "Known as lot numbered 97 on plan on Sunnyside, near Pavilion Station, Revere Beach, owned by Revere Beach Land Company, recorded with Suffolk Deeds, Lib. 1579, and bounded northerly on Garfield Avenue forty (40) feet; easterly on lot numbered 96, eighty-three and $\frac{3}{10}$ (83.3) feet; southerly on land of Pratt heirs, forty and $\frac{30}{100}$ (40.30) feet; westerly on lot numbered 98 on said plan, seventy-eight and $\frac{35}{100}$ (78.35) feet; containing 3,233 square feet more or less, same premises conveyed by Everett H. Hadley,

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by deed recorded said Deeds, Lib. 2219, page 71"; that after part of the labor was performed, Hall transferred the premises to his wife, the respondent, by deeds running from him to one Hadley, and from Hadley to her; and that, within thirty days after he ceased to labor and furnish labor on the building, the petitioner filed in the registry of deeds "a just and true account of the amount due him for labor performed and material and labor furnished, with all just credits given, together with a sufficient description of the premises." The account annexed to the petition contained items for labor only.

Trial in the Superior Court, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

The petitioner put in evidence the report of an auditor, to whom the case had been referred, and rested. The auditor found that the petitioner, waiving any claim for material furnished, sought to enforce a lien for labor only; that one Colburn conveyed to Charles E. Hall, by deed dated May 15, 1894, a lot of land in Revere numbered 97, as shown on a plan recorded with Suffolk Deeds, Lib. 1579, fol. 311, and bounded in the deed forty feet on Garfield Avenue; that Hall conveyed the same lot "with the buildings thereon," by deed dated August 17, 1894, to Everett H. Hadley, who by deed of even date conveyed it "with the buildings thereon" to the respondent; that all of these deeds were recorded; that the part of the street or avenue on which lot 97 is situated was sometimes called Vine Street, although it was not so shown upon the recorded plan; that the description of the premises, both in the petition and in the statement, substantially followed the description in the deeds above mentioned; that the transfer of lot 97 from Hall through Hadley to the respondent was without notice to or the knowledge of the petitioner; that neither ever notified the petitioner of the transfer of title; that the respondent gave some directions to the petitioner about the work of constructing the house; that Hall exercised general supervision of the work on the house, both before and after August 17, 1894, and after that date gave written orders for material for the house; that prior to said date Hall had paid the petitioner certain sums of money on account; that Hall and the respondent had lived in the house since October, 1894; that the contract between the petitioner and Hall was an

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oral one to perform and furnish the labor necessary to build the house, for which he was to receive a fair price; that the sills of the house rested on eighteen cedar posts driven from twenty-four to thirty inches into the ground, and cut off three and one half to four feet above the ground; that the sills were cornered and spiked together with round wire nails about four inches long; that the chimney was set about eighteen inches into the ground, and extended up through the house; that there was no cellar under the house, and part only of the turf under the house was removed; that the sills were fastened to the posts by thirty-penny wire nails, and the house was not plastered to the chimney; and that if, as matter of law, the petitioner was entitled to enforce a lien upon the property, the amount for which such lien might be enforced was a sum stated.

The respondent offered evidence tending to show that the street upon which the house in question was built was not in fact Garfield Avenue, and was never known as Garfield Avenue, but was really Vine Street, and always known as Vine Street, and never otherwise; and that Garfield Avenue was in fact about one thousand feet distant from and at a right angle with Vine Street; and evidence in rebuttal was offered by the petitioner that the description in the petition was the same as in the respondent's deed; and that the street was known as Garfield Avenue.

The respondent asked the judge to instruct the jury as follows:

"1. No sufficient description of the alleged land attempted to be described therein is contained in the petition, as required by law, for the reason that the land cannot be identified by means of the description contained in the petition, without reference to the plan therein referred to, and the description cannot be so aided, and is insufficient and void."

This request was refused, the judge instructing the jury as follows: "If the description of the premises in the petition is such that it points out and indicates the premises, so that by applying the description to the land it can be found and identified, it is sufficient."

"2. If the land attempted to be described in the statement and certificate was not, at the date of the statement and certificate, actually bounded northerly on Garfield Avenue, this peti-

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tion cannot be maintained, and the respondent is entitled to a verdict on that issue."

With reference to this request, the judge instructed the jury as follows: "If the description in the statement was such that, taken as a whole, the lot could be reasonably recognized therefrom, it was sufficient. It is required that the description be sufficiently accurate for the identification of the lot, and if it is, the provision of the statute is satisfied."

"3. No question being made at the trial by the petitioner as to the perfect honesty and good faith of the parties in respect to the conveyance by C. E. Hall to Hadley, and that by Hadley to respondent, no lien can be enforced in this proceeding for any labor performed or furnished prior to August 17, 1894."

This request was refused, the jury being instructed otherwise.

"4. The petitioner is not entitled to claim any lien for labor performed or furnished after August 17, 1894, for the reason that he has not offered any evidence which is competent to show that any privity of contract existed between himself and the respondent in respect thereto."

This was refused, and upon the subject of this and the preceding request the judge instructed the jury that the burden of proof was upon the petitioner to satisfy them that the labor in question, both before and after August 17, 1894, was performed and furnished by the petitioner under a contract between himself and Charles E. Hall, by the terms of which Hall employed him generally to perform and furnish the labor necessary for the construction of the house, and promised to pay him a fair and reasonable price for his labor so performed and furnished; and that, unless the petitioner sustained this burden the respondent was entitled to a verdict.

"5. Upon the facts found and stated by the auditor, the house was personal property."

This was refused, the jury being instructed that, if they found the facts as stated by the auditor, the house would be part of the realty, and would not be personal property; that the petitioner was bound to prove that the house was attached to and formed part of the land on which it stood; that the house was part and parcel of the real estate at the time when he performed and furnished labor, and that the burden of proof was on the petitioner

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on this issue; and that, if the house was personal property, the petitioner would not be entitled to a lien, but would be so entitled if the house was part of the realty, and if he had proved the other elements of his case.

"6. The burden of proof is on the petitioner to show that the lot of land was, at the date of his statement and certificate, actually bounded northerly on Garfield Avenue." This was refused.

As the evidence for the petitioner (the auditor's report) tended to show that the contract was for labor only, and not for labor and materials, as alleged in the petition, the respondent asked the judge to rule that this constituted a fatal variance. The petitioner thereupon asked leave to amend the petition. The respondent then asked the judge to rule that it was not within his discretion to allow the petition to be amended by setting forth a different contract from that originally set forth therein. This request was refused, and the amendment was allowed; and to this order, and to the several refusals to rule and rulings given, the respondent excepted.

Upon certain issues submitted to them, the jury found in favor of the petitioner; and the respondent alleged exceptions.

J. F. Pickering, (*J. W. Pickering* with him,) for the respondent.

H. L. Whittlesey, for the petitioner.

ALLEN, J. The sufficiency of the description of the land was rightly left to the jury. A description is sufficient which will enable one who is familiar with the locality to identify the land with reasonable certainty; and inaccuracies will not vitiate the lien, if the land can be so identified. St. 1892, c. 191. *Cleverly* v. *Moseley*, 148 Mass. 280. Phillips, Mechanic's Liens, §§ 379, 383, and cases there cited. Under proper instructions, the jury must have found the description to be sufficient, and we cannot say that they were wrong.

The respondent contends that it is a part of the petitioner's description, that the lot of land was owned by Charles E. Hall and Margaret H. Hall at the time when the labor was furnished, while it is an undisputed fact that they were never joint owners of the land. If this is treated as a matter of description, it is merely an inaccuracy, which is not fatal.

The respondent further contends that the petitioner has no

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claim against her, and no lien upon her property, and that his claim is only against Charles E. Hall and his property. The land was owned by Charles E. Hall until August 17, 1894, and under the instructions by the court, the jury must have found that the labor, both before and after August 17, was performed and furnished by the petitioner under a contract with Hall, by the terms of which Hall employed him generally to perform and furnish the labor necessary for the construction of the house, and promised to pay him a fair and reasonable price therefor. If work is done under such a contract made with the owner, a conveyance by him while the work is going on will not defeat the lien. *Gale* v. *Blaikie*, 126 Mass. 274. The lien continues till all that is called for by the contract has been done.

Upon the facts found by the auditor, the house was real estate. *McIver* v. *Estabrook*, 134 Mass. 550. *Westgate* v. *Wixon*, 128 Mass. 304. *Madigan* v. *McCarthy*, 108 Mass. 376.

The court rightly refused to instruct the jury that the burden of proof was on the petitioner to show that the lot of land was actually bounded northerly on Garfield Avenue. The way this question arose was as follows. The description in the petition bounded the lot northerly on Garfield Avenue forty feet. The respondent offered evidence to show that the street was not in fact Garfield Avenue, and was never known by that name, but was really Vine Street, and always known as Vine Street, and never otherwise. To meet this, the petitioner offered evidence that it was known as Garfield Avenue. The description would be satisfied, to a reasonable intent, by proof that the street was known as Garfield Avenue, whether that was the true name of the street or not.

It was competent to allow the amendment of the petition. Pub. Sts. c. 191, § 20. *Brosnan* v. *Trulson*, 164 Mass. 410.

Exceptions overruled.

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AMOS L. ALLEN *vs.* ELIZABETH A. CHAPMAN.

Suffolk. March 24, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Forcible Entry and Detainer against Lessee of Mortgagor.

If a person who purchases an estate at a sale under a power contained in a mortgage, with a provision authorizing the mortgagee to purchase at the sale, is the agent of the mortgagee, and the conveyance to him from the mortgagee and the reconveyance by him to the mortgagee are simultaneous acts, an action against the mortgagor's lessee to recover possession of the estate may be maintained by the mortgagee, under Pub. Sts. c. 175.

ACTION, on the Pub. Sts. c. 175, to recover possession of an estate in Boston. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

M. F. Farrell, for the defendant.

S. P. Smith, for the plaintiff.

KNOWLTON, J. This is a summary process for the recovery of land, brought under Pub. Sts. c. 175, § 1, which provides among other things that, "when a mortgage of real estate has been foreclosed by a sale under a power contained therein or otherwise, the person entitled to the premises may recover possession thereof in the manner hereinafter provided." A mortgage upon the premises sought to be recovered was foreclosed by a sale under a power contained therein, and the only questions in the case are whether the plaintiff is a party who may sue and the defendant a party who may be sued under this statute. The plaintiff was the mortgagee, and he bought the property at the sale through an agent whom he procured to bid at the auction in his own name, but in the plaintiff's behalf. A deed was made to the agent, who simultaneously executed a deed of quitclaim and release to the plaintiff. The sole object of the parties was to effect a foreclosure, and to place the title to the property in the plaintiff. It has been expressly decided that one who has a title obtained as this was may avail himself of this statute to get possession of the premises by a suit against

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the mortgagor. *North Brookfield Savings Bank* v. *Flanders*, 161 Mass. 335.

The defendant is in possession under a lease for years from the mortgagor, made subsequently to the mortgage. The only remaining question is whether the plaintiff can proceed against her under this statute as he could have proceeded against the mortgagor if no lease had been made. We are of opinion that he can. The defendant has no better title than his lessor, and there is no reason why, in taking the title of the mortgagor, he should not be subject to the same liabilities as the mortgagor in regard to the paramount rights of the mortgagee. We are of opinion that the decision of the Superior Court was correct.

Judgment affirmed.

CHARLES A. BELL *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 24, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Assumption of Risk — Action — Inference from Photographs.

If an employee of a railroad corporation, while getting down from the top of a car by a side ladder in the discharge of his duty, is injured by coming in contact with one of the iron pillars of a bridge over the track, the pillar being about four feet from the track, he cannot recover in an action against the corporation for his injuries if he was an experienced hand, and knew that the bridge was there, and that cars might have only side and no end ladders.

TORT, for personal injuries occasioned to the plaintiff, a brakeman on a freight train, on August 20, 1895, by coming in contact with one of the pillars of the drawbridge in South Boston, in the defendant's railroad yard, while descending the side ladder of a moving car at night. The declaration was at common law.

Trial in the Superior Court, before *Bond*, J., who ruled that the case should be submitted to the jury, directed them, by consent of the parties, to return a verdict for $2,250, and reported the case for the determination of this court. If the plaintiff was

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entitled to recover, the verdict was to stand; otherwise, it was to be set aside, and judgment was to be entered for the defendant. The facts appear in the opinion.

J. H. Benton, Jr., & C. F. Choate, Jr., for the defendant.

L. M. Child, for the plaintiff.

HOLMES, J. This is an action at common law for personal injuries. The plaintiff was a brakeman employed by the defendant as a shifter at night. As he was getting down from the top of a car by a side ladder, there being no end ladder, in order to pull out a pin and disconnect his car from the engine, he came in contact with one of the iron pillars of a bridge over the track and was hurt. The pillar was about four feet from the track. The plaintiff knew of the bridge, and was an experienced hand. He also knew that cars might have only side and no end ladders. It is suggested on the strength of photographs exhibited that the pillar which probably did the harm was inside the line of the rest, and that there was a trap, as was held in *Ferren* v. *Old Colony Railroad*, 143 Mass. 197. It is enough to say that, in our opinion, the photographs do not warrant the inference. We do not perceive any sufficient distinction between this and the numerous cases which have been before us of late years, and in which it has been held that the plaintiff took the risk of such dangers and could not recover. *Vining* v. *New York & New England Railroad*, 167 Mass. 539. *Content* v. *New York, New Haven, & Hartford Railroad*, 165 Mass. 267. *Austin* v. *Boston & Maine Railroad*, 164 Mass. 282. *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287. *Thain* v. *Old Colony Railroad*, 161 Mass. 353. *Goldthwait* v. *Haverhill & Groveland Street Railway*, 160 Mass. 554. *Fisk* v. *Fitchburg Railroad*, 158 Mass. 238. *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 79.

Judgment for the defendant.

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BRIDGET E. HASTINGS *vs.* HERMAN PARKER & another.

Norfolk. March 24, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Petition to vacate a Judgment — Statute — Answer.

Under St. 1895, c. 234, entitled "An Act relative to the vacation of judgments and writs of and petitions for review," the petitioner cannot require the respondent to file an answer.

PETITION, filed April 9, 1896, in the Superior Court for the county of Norfolk, to vacate a judgment rendered against the petitioner in that court, and for a supersedeas and other relief, pursuant to St. 1895, c. 234. At the hearing in the Superior Court, before *Dunbar*, J., it appeared that an order of notice was duly issued pursuant to § 3 of the statute; that the petitioner read the petition and asked the judge to order the respondents to file an answer, but that the judge declined so to order, and dismissed the petition with costs; and the petitioner alleged exceptions.

B. F. Briggs, for the petitioner.

W. S. Pinkham, for the respondents.

FIELD, C. J. The only exception is to the refusal of the court to order the respondents to file an answer to the petition.

The St. 1895, c. 234, does not require the respondent to file an answer, and there is no rule of the Superior Court that in terms requires an answer to such a petition. Such a petition, like a petition for a writ of review, never has been treated as an action at law in which the respondent may be defaulted if he does not file an answer, and the proceedings are not within the provisions of Pub. Sts. c. 167, §§ 13–29, and §§ 45–47.

It is unnecessary to consider whether the court has not the power to order an answer to be filed to such a petition if it seems to the court necessary or desirable. The petitioner has no right to require this to be done.

Exceptions overruled.

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JOHN J. CRAWFORD *vs.* MICHAEL MORAN & others.

Suffolk. March 24, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Agency — Evidence — Admissions.

In an action to recover salary due to a salesman, who was hired by an agent of the defendant, a written receipt for money received by the plaintiff from the defendant through the hands of the agent is admissible in evidence, as an act or declaration of authority by such agent, without showing that the defendant had personal knowledge of it at the time it was taken by his agent, when it is offered in connection with evidence that the defendant had authorized his agent to employ salesmen and to contract with them in the defendant's name, had advised him to hire the plaintiff, and had furnished his own checks, drawn to the order of the plaintiff, in payment of his salary and expenses.

In an action by A. upon a contract between himself and B., who was the agent of C., signed by A., B., and C., by which B. employed A. as a salesman for C., A., in order to negative the theory that he gave exclusive credit to B., may testify that when he signed the contract and acted under it he relied upon C.

CONTRACT, to recover $100, being the amount of salary due to the plaintiff for services as a travelling salesman for the defendants from December 30, 1895, to January 27, 1896.

At the trial in the Superior Court, before *Lilley*, J., there was evidence tending to show that the defendants, who were copartners, carrying on business until the autumn of 1895 under the firm name of Charles E. Hall and Company, and after that under the name of the National Soda Fountain Company, on October 8, 1895, entered into an agreement, under seal, with one Presby, to employ him as a salesman for two years from that date, stipulating that he should devote his entire time, labor, and ability as a salesman to the business of the defendants, in compensation for which he should receive "the sum of fifteen per cent on the net sales of all soda fountains effected by him, or his agents, which percentage is to include all compensation for travelling, or sales expenses," and allowing him "to draw on account the sum of fifty dollars, and such sums as may be necessary for travelling or sales expenses"; that on December 5, 1895, Presby made a written contract with the plaintiff, of which the following is a copy.

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"Agreement, Dec. 5th, 1895.

"This agreement, entered into between George T. Presby, party of the first part, and John J. Crawford, party of the second part:

"The party of the first part agrees to employ and pay a salary of $25 each week and travelling expenses to the party of the second part. This to take effect on this date; to expire October 1, 1896.

"That after the first day of July to be held on waiting orders, and no regular travelling expenses allowed, only such as are necessary in carrying out direct orders from the party of the first part.

"The party of the second part agrees to devote his whole time and attention to the sale of the National Soda Fountains, and only such goods as may be offered him for sale by the party of the first part.

[Rubber stamp.]
"The National Soda Fountain Co.
George T. Presby,
John J. Crawford."

The plaintiff introduced in evidence certain checks of Charles E. Hall and Company, drawn to his order, delivered by the defendants to Presby, and by him to the plaintiff, in payment of his salary and expenses. The plaintiff also offered in evidence the following receipt.

"The National Soda Fountain Co.
Office 78 Sudbury St.
Factory 67 to 93 Charlestown St.
"Boston, Dec. 30, 1895.

"Rec'd of Chas. E. Hall & Co., check fifteen dollars through hands of George T. Presby to apply on expense account.
"John J. Crawford."

The defendants objected to the admission of the receipt, unless it should first be shown that the defendants had knowledge of it when it was taken. The judge admitted it, and the defendants excepted.

The plaintiff testified that, when he signed the contract, he knew that Presby had a contract with the defendants, but that he neither knew nor asked the extent of Presby's authority.

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He further testified, subject to the exception of the defendants, that when he signed the contract, and acted upon it, "he relied upon the National Soda Fountain Company, knowing them to be Charles E. Hall & Company."

Presby testified that, before hiring the plaintiff, he told the defendants that it was time to force the sale of their goods, and to make a canvass for that purpose, and that they replied they would leave that to him; that he afterwards introduced the plaintiff to them, saying that he was a good man, and was told that he had better hire him. There was other evidence that the defendants had held Presby forth as the general manager of their sales department.

One of the defendants testified that the checks given to the plaintiff were made at the request of Presby, and for his convenience, so that he might send money to agents on the road, and that they were charged to him on the cash book of the defendants.

At the close of the evidence, the defendants requested the judge to rule that, if the plaintiff when he made the contract knew that Presby was the agent of the defendants, he could not hold the defendants, because the contract, by its terms, was with Presby, and in no way stated that the defendants were to be bound thereby.

The judge declined so to rule, and submitted the case to the jury, who returned a verdict for the plaintiff; and the defendants alleged exceptions.

H. V. Cunningham, for the defendants.

G. W. Anderson, (*C. H. McIntyre* with him,) for the plaintiff.

ALLEN, J. 1. The receipt given by the plaintiff to Presby was admissible, on the ground that evidence had already been introduced which, if believed, was sufficient to show that Presby in taking it was acting as the defendants' agent. The plaintiff had offered evidence tending to show that the defendants had expressly authorized Presby to employ salesmen, and enter into any reasonable contracts with them in the name of the defendants; that they had held him out as the general manager of their sales department; and especially that one or more members of the defendant firm had said to Presby that he had better hire the plaintiff. There was also evidence tending to show that the

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defendants had furnished their own checks drawn to the plaintiff's order in payment of his salary and expenses, and the receipt in question was given upon the delivery of such a check to the plaintiff by Presby. In view of this evidence of agency, the acts and declarations of Presby in the course of his employment were competent to be submitted to the jury to affect the defendants. The taking of the receipt was an act of this character, and the receipt might be put in evidence without showing that the defendants had personal knowledge of it at the time it was taken. The denial and explanation by one of the defendants was merely evidence for the jury. *Thomas* v. *Wells*, 140 Mass. 517. *Ford* v. *Linehan*, 146 Mass. 283. Taylor, Ev. §§ 590, 602.

2. It was competent to allow the plaintiff to testify that he relied upon the defendants when he signed the contract and acted under it, in order to negative the theory that he gave exclusive credit to Presby. The firm name of the defendants was signed to the contract, and the purpose of the contract was to employ the plaintiff to sell the defendants' goods. According to the literal construction of the contract, the promise to pay the plaintiff was made by Presby; but it is well settled that in a contract of this kind, not under seal, the real party in interest may be charged as principal upon oral evidence. *Byington* v. *Simpson*, 134 Mass. 169. *Lerned* v. *Johns*, 9 Allen, 419. *Huntington* v. *Knox*, 7 Cush. 371. Story, Agency, § 270. Both principal and agent may be bound. *Brown* v. *Bradlee*, 156 Mass. 28, 32.

There was no error in the rulings.

Exceptions overruled.

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JOHN MOYNIHAN *vs.* KING'S WINDSOR CEMENT DRY MORTAR COMPANY.

Suffolk. March 25, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — Negligence — Evidence.

In an action for personal injuries it appeared that the defendant corporation had a two-story permanent stage extending from its warehouse to the edge of a wharf; that it had a swinging stage, made of heavy planks bolted together strongly by cross-pieces, which was used in connection with the permanent stage, and was run over the decks of vessels, one end resting on the permanent stage, and the other being supported by the ropes fastened to the masts of vessels, from which their cargoes were discharged by being hoisted and delivered upon trucks standing near the outer end of the swinging stage, and thence wheeled into the warehouse; that, while the plaintiff was engaged by the defendant in this work of trucking, a rope which held one corner of the swinging stage, and which was fastened to one of the masts of a vessel, broke, and the stage gave way, and the plaintiff was injured; that the captain of the vessel raised the freight from the hold by tackle and slings, and lowered it into the defendant's trucks, which were about four feet from the outer end of the swinging stage; that the captain employed a stevedore to stand on the swinging stage, manage it, receive the bags and lower them into the trucks; that the ropes and tackle were furnished and operated by the captain and crew of the vessel, and the defendant did nothing in reference to them, and that several hours before the staging fell the defendant's foreman, who had engaged the plaintiff and another laborer, told them, "As soon as the stageman is ready, have your trucks ready to go out." *Held*, that it was properly ruled that the action could not be maintained against the defendant, but that it did not follow that the plaintiff was without remedy against the owners of the vessel.

In an action for personal injuries occasioned to the plaintiff by the breaking of a rope attached to one corner of a swinging stage and to the mast of a vessel lying at a wharf, while he was engaged in trucking bags of cement and mortar to the defendant's warehouse, evidence that different kinds of staging were used for unloading sugar elsewhere is immaterial.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. Trial in the Superior Court, before *Lilley*, J., who, at the close of the evidence, directed a verdict for the defendant, and, at the request of the plaintiff, reported the case for the determination of this court. If the ruling was correct, judgment was to be entered upon the verdict; otherwise, the case was to stand for trial.

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W. H. Baker, for the plaintiff.

J. K. Berry, (*E. C. Upton* with him,) for the defendant.

ALLEN, J. The defendant owned a warehouse situated upon a wharf, and had a two-story permanent runway or stage extending from the warehouse to the edge of the wharf. It also had a movable or swinging stage, made of heavy planks bolted together strongly by cross-pieces, which was used in connection with the permanent stage, and was run out over the decks of vessels, one end resting on the permanent stage, and the other being supported by ropes fastened to the masts of vessels. Cargoes were discharged from vessels by being hoisted and delivered upon trucks standing near the outer end of this swinging stage, and thence wheeled into the warehouse. While the plaintiff was engaged in this work of trucking, a rope which held one corner of the swinging stage, and which was fastened to one of the masts of a vessel, broke, and the stage gave way under the plaintiff, and he fell to the deck of the vessel and was hurt.

The plaintiff was engaged by the defendant to truck bags of cement and mortar from where they were received on the swinging stage to its warehouse. The captain of the vessel raised the freight from the hold by tackle and slings, and lowered it into the defendant's trucks, which were stationed about four feet from the outer end of the swinging stage. The captain employed a stevedore to stand stage, that is, to stand on the swinging stage, see that it was properly adjusted, according to the state of the tide, to receive the bags as they were raised from the vessel, and to lower them into the trucks of the defendant's employees.

The defendant had no ropes or tackle connected with the staging, or used in rigging or supporting it, but the ropes and tackle were furnished and operated by the captain and crew of the vessel, and the defendant did nothing with reference to the same. This was according to the usual practice when vessels arrived at the wharf, the swinging stage being handled and managed under the direction of the captain of the vessel, or the person in charge thereof. This had been done on the occasion of the accident to the plaintiff. The defendant's foreman, having engaged the plaintiff and another laborer for the work of trucking the freight, told them "as soon as the stage man is

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ready, have your trucks ready to go out"; and the staging fell after they had been at work for several hours.

The plaintiff testified that he did not know who furnished the ropes, or put them up, or managed them.

Upon these facts it is apparent that, if there was negligence in furnishing and using an insufficient rope for the support of the swinging stage, such negligence was to be attributed to those in charge of the vessel; and it is now well settled that they owed a duty to one in the position of the plaintiff to use due care for his safety, for breach of which he might maintain an action. *Hayes* v. *Philadelphia & Reading Coal & Iron Co.* 150 Mass. 457. *Elliott* v. *Hall*, 15 Q. B. D. 315.

The plaintiff's claim rests solely upon the duty of the defendant at common law. A count in the declaration charging negligence upon a superintendent of the defendant under the employer's liability act, St. 1887, c. 270, was waived. There was no averment that the swinging stage was a part of the defendant's ways, works, or machinery; and it would seem that an action could not be supported on that ground without proof that the defendant controlled or managed it. *Trask* v. *Old Colony Railroad*, 156 Mass. 298. *Engel* v. *New York, Providence, & Boston Railroad*, 160 Mass. 260.

The occupation and use of the swinging stage were joint. The captain discharged the cargo of the vessel upon it. The defendant received the cargo there, and trucked it away into its warehouse. But the support, control, and management of the outer end of the stage belonged to the captain. He had attended to supporting it at the outset with ropes, and he had his stage man there to attend to the management of it afterwards. The duty and responsibility primarily rested upon him; and the defendant cannot be held responsible, unless upon proof of neglect of a duty of inspection and warning.

In the absence of anything to excite suspicion or apprehension, the defendant might assume that due care would be used by those in charge of the vessel. It was a matter which it was their duty to see to. It was within their part of the work, and the stage man employed by the captain was to stand constantly upon the swinging stage. There was no evidence of a usage on the part of warehousemen to inspect the rigging, under such

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circumstances. No duty of inspection rested on the defendant, unless there was something in the facts or circumstances to show that such an inspection ought to have been made. No witness testified to having observed anything in the mode of supporting the stage to excite attention. There was, indeed, the evidence of one Pray, who had never seen this stage, nor any other like it, in use, and whose knowledge of stages was confined to those of a different kind, used for the unloading of sugar in bags four times as heavy as the bags of cement and mortar. His opinion that a swinging stage like the one in question was not safe and adequate amounted to nothing, because such stages were in common use, and the plaintiff took his chance upon this kind of stage, supported by ropes fastened to the masts. The plaintiff cannot recover unless there was negligence in providing an insufficient support. He was used to working upon similar stages, and his only ground of complaint is that the rope was rotten. Evidence that different kinds of staging were used for unloading sugar elsewhere was of no importance. *Veginan* v. *Morse*, 160 Mass. 143.

Upon the evidence, no duty of inspection of the ropes to see that they were sound rested upon the defendant. *Garragan* v. *Fall River Iron Works Co.* 158 Mass. 596. *Regan* v. *Donovan*, 159 Mass. 1. *Shea* v. *Wellington*, 163 Mass. 364. *O'Connor* v. *Rich*, 164 Mass. 560.

It was therefore properly ruled that the action could not be maintained against the defendant; but it does not follow that the plaintiff is without remedy against the owners of the vessel.

Judgment upon the verdict.

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HELEN P. GILMAN *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. March 25, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Railroad — Accumulation of Snow and Ice on Steps of Car — Negligence — Finding — Due Care — Law and Fact.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff by slipping upon an accumulation of snow and ice on a step of one of the defendant's cars, which was part of a train that had run from R. to B., a distance of thirty-five miles, there was evidence of a snow storm which lasted all day in S., about midway between R. and B., and most of the day in B.; that it stopped snowing in B. at nine o'clock in the evening, and was not snowing in S. a little over half an hour later when the plaintiff took the train there for B., where the accident occurred as he was leaving the train; and that the snow was hard, as if it had been there some time. *Held*, that the jury were warranted in finding that the snow and ice were on the steps of the car before it left R., and that the defendant was liable for not having cleared the step.

The question whether a passenger was in the exercise of due care in leaving a railway car, the step of which was covered with an accumulation of snow and ice, upon which she fell and was injured, and who testifies, in an action for her injury, that she saw the condition of the step and fell just as her daughter, who preceded her, warned her, is for the jury.

TORT, for personal injuries occasioned to the plaintiff, by slipping upon an accumulation of snow and ice on a step of one of the defendant's cars, which was part of a train that had run from Rockport to Boston, a distance of thirty-five miles, the plaintiff having taken the train at Salem, about midway between the termini. At the trial in the Superior Court, before *Fessenden*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

T. Hunt & F. P. Sears, for the defendant.

W. D. Turner, for the plaintiff.

HOLMES, J. The jury found, in answer to a question from the judge, that the snow and ice were on the steps of a car before it left Rockport. The real questions raised by the exceptions are whether there was any evidence which warranted this finding, and if so, whether it warranted the conclusion that the defendant was liable for not having cleared the step. A ruling was asked to the effect that a railroad company is not bound to

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keep an exposed platform clear while *in transitu* during a storm, and the jury were instructed that there was no rule of law which absolutely requires it, but that it was for them to say what was reasonable. Considering the evidence as to the middle brakeman's duty,* we are not prepared to say that there was error in the instructions as applied to a local passenger train; but this we need not decide, as the verdict of the jury went on a different view of the facts. If the snow and ice upon which the plaintiff slipped were on the step before the train started, there is no need to consider what the defendant's duties would have been if they had accumulated during the passage of the train.

We cannot say that the jury were not warranted in their finding. There was evidence of a snow storm, which lasted all day in Salem and most of the day in Boston. It is not unfair to infer that so persistent a storm extended to Rockport. There was evidence that it stopped snowing in Boston at nine in the evening, and that it was not snowing at Salem a little over half an hour later, when the plaintiff left a concert there and took the train. The snow was hard, as if it had been there some time. If this evidence was believed, it was a possible inference that the snow was on the step before the train started. If so, and if it was in such a condition that it was likely that some one would slip upon it, the jury were warranted in finding that the condition ought to have been remedied at the earliest practicable moment. *Weston* v. *New York Elevated Railroad*, 73 N. Y. 595. *Neslie* v. *Second & Third Streets Passenger Railway*, 113 Penn. St. 300. See *Dodge* v. *Boston & Bangor Steamship Co.* 148 Mass. 207. The cases of *Palmer* v. *Pennsylvania Co.* 111 N. Y. 488, and *Kelly* v. *Manhattan Railway*, 112 N. Y. 443, are distinguishable.

The question of the plaintiff's care was for the jury.† She may have had no reason to expect ice on the steps, and she fell

* The conductor of the train testified that he carried brooms on the train for the purpose of removing snow; that it was the duty of the middle brakeman to sweep the platform with a broom; and that he should have swept it on the way to Boston.

† The plaintiff testified on this point as follows: "When we reached Boston my two daughters preceded me in going out of the car. When I got to the door and to the steps, of course I saw the condition of the steps; then my daughter, my eldest daughter, who was the second to alight, said to me, 'Be careful, mother,' and I went down."

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at the same instant that her daughter warned her. *Fleck* v. *Union Railway*, 134 Mass. 480. *Bethmann* v. *Old Colony Railroad*, 155 Mass. 352. *Exceptions overruled.*

MARIETTA R. JEFFERSON *vs.* HERBERT P. JEFFERSON.

Middlesex. March 25, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Divorce — Cruel and Abusive Treatment — Revival of Cause of Divorce after Condonation.

At the hearing on a libel for the divorce of a wife from her husband on the ground of cruel and abusive treatment, there was evidence that the libellee had inflicted physical violence on the libellant by striking her with his fist, knocking her down, pushing her about, and pinching her; that he used profane and indecent language to her in the presence of their children, and that this course of treatment continued during a period when the libellee knew that the libellant was pregnant, so that her health was materially affected by his conduct. *Held*, that the evidence was sufficient to warrant a decree for the libellant.

At the hearing on a libel for divorce on the ground of cruel and abusive treatment, the judge properly ruled that a letter written by the libellant to the libellee condoning his misconduct, "if accepted and acted on by him, is conclusive evidence of condonation of all causes of divorce then known to the libellant, unless the libellee was guilty of such subsequent misconduct as legally to invalidate the same."

To revive a cause of divorce for cruelty, it is not necessary that the misconduct subsequent to condonation should be sufficient of itself to warrant a decree for divorce without regard to the previous cruelty, but it is enough if there are such frequent acts of unkindness or persistent ill treatment as to warrant a well grounded belief that, if the cohabitation continues, the ill feeling will quickly break out in acts of gross cruelty.

LIBEL, filed January 1, 1896, by Marietta R. Jefferson for a divorce from Herbert P. Jefferson, on the grounds of cruel and abusive treatment.

Hearing in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

The libellant introduced evidence tending to show that she was married to the libellee on October 8, 1885, and that four children were born to them, of whom at the time of the trial three were living; that the libellee was a physician, who carried

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on a private hospital for the treatment of diseases of women; that at one time in August, 1894, when the libellant and libellee were together in the dining-room, the former happened to stand in the way of her husband as he was crossing the room, and that he struck her in the side with his fist and knocked her down and stunned her; that in the early part of September, 1895, he struck her on the left side of her face and cut her ear so that it bled, after which he again advanced with both fists raised, threatening to strike her again, whereat she took a chair, and, throwing it at him, said, "Don't strike me again"; that he then took her by the arm, dragged her across the floor of his office at the hospital, and threw her down the front steps; that she stumbled, but did not fall, and that the marks of his fingers on her arm lasted two weeks; that in November or December, 1895, the libellee was using very vile and obscene language to the libellant in the presence of two of their children, and, when requested by the libellant to desist therefrom, he struck her in the face; that, continuously from August, 1894, the libellee made physical attacks and inflicted blows upon the libellant, and frequently, at a time when he knew that she was pregnant, took her by the arm and threw her violently out of the room in the presence of her children; that he repeatedly pinched her, threatened her, shook his fist at her, and raised his cane to strike her; that on December 31, 1895, he came towards her shaking his fist, and almost touched her, and she, thinking he meant to strike her, jumped back; that in October, 1895, he took the children away from home and kept some of them at the hospital from ten days to two weeks, during which time they were not brought home, and the libellant did not see them; that the libellee frequently threw biscuits, knives, forks, and spoons to the floor, at the same time swearing at his wife, and at one time threw the coffee-pot out of the window; that at different times before his children, he called his wife a "darn fool," a "God damn fool," "a dirty thing," told her to "shut up," said she was not fit to be in the house where anybody was, and told the children not to mind her for she was only a damn fool, and frequently addressed to her profane and indecent language; that in September, 1895, the libellant became ill, and suffered a great deal of pain; that the libellee would make her cry hysterically, and the more she

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cried the worse he swore at her; that at her brother's house she frequently threw herself on the sofa and shed tears; that she appeared to be gradually fading away, and was afraid that she would break down or have convulsions, and was very much distressed about her children; and that on February 18, 1896, the libellant, in consequence of her physical and mental condition, brought about by the ill treatment and abuse of the libellee, was prematurely confined, and the child of which she was delivered died shortly afterwards.

On cross-examination, the libellant testified that on September 23, 1895, in response to a letter from the libellee, she wrote the following letter:

"My dear Husband, — I have just received your letter as I was out driving with the baby. I deeply regret all the trouble that is behind us, and am sorry my unruly tongue got the better of me. I have told you every time I have seen you that I had no intention of leaving you, that I prefer to live with you as your wife, and have made up my mind to stop quarrelling at all costs. I will endeavor as far as possible to retrench expenses, and be satisfied with whatever you think you can do for me and the children. Nothing in the world is so wretched for little children as to see their parents unhappy together, and I am more than willing to do whatever lies in my power. This affair has caused me quite as much misery as it has you. I have consulted no one in this matter, and I give you my word no one has seen this letter. Everything looks blue to you now for you are still very ill, but try to see the bright side of things. I am very sorry that I said anything about your not having the hospital, for of course you will have it, and make a grand success of it, and I shall be proud of it as you are, for your success will mean happiness to me. Please consent to see me, and for the sake of our children let us try to be happy.

"Your true Wife."

The libellant further testified, on cross-examination, that when she wrote the letter her husband had been ill two weeks at the hospital; that she did not think him responsible for his actions at the time, and that she was willing to make any concessions, and do anything else she could to help him; that although she tried not to be angry with her husband she sometimes answered

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him back, but never swore at him; that he always began the altercations, and was always to blame; that he had abused her for seven years preceding the filing of the libel, but was much worse in the winter of 1895; that the hardest blow that he ever struck her was in September, 1895, at his hospital; that he pinched her as many as twenty times between September and January, one of the occasions being a day or two after the letter of September 23, and again a few days afterward on both arms, and at such times she cried out, but did nothing to him; that in November, 1895, the libellee blew tobacco smoke into his little girl's face until it nauseated her, and upon the libellant remonstrating, he took her by the arm, dragged her across the library, and threw her half way across the hall; that she resisted for a moment, and then yielded, and was forcibly thrown or pushed out; and that the libellee was a pretty strong man, and took hold hard.

On redirect examination, she testified that the libellee often gave wine to the little boys at dinner, and on one occasion, when the wine affected her son Richard, who was about seven years old, his father laughed, and said, "Richard, you are as full as a goat"; and that, on the libellant remonstrating, he gave him some more.

The libellee introduced testimony in denial and contradiction of the evidence of the libellant, and at the close of the case he requested the judge to rule: "1. That the letter of the libellant to the libellee, September 23, 1895, is conclusive evidence of condonation of all causes of divorce then known to libellant. 2. That there is no evidence of such conduct on the part of the libellee since September 23, 1895, and before the filing of this libel, which revived the right to maintain the libel for any cause arising before September 23, 1895, and known to the libellant at the time of filing this libel. 3. That there is no evidence of cruelty or abusive treatment on the part of the libellee sufficient to justify a decree for the libellant."

The judge declined to rule as requested, but ruled that the letter of September 23, 1895, written to the libellee, "if accepted and acted on by him, is conclusive evidence of condonation of all causes of divorce then known to the libellant, unless the libellee was guilty of such subsequent misconduct as legally to invalidate the same."

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The judge entered a decree for the libellant; and the libellee alleged exceptions.

C. E. Hellier, for the libellee.

Samuel Hoar, for the libellant.

KNOWLTON, J. The question in this case is whether there was evidence to warrant the findings of the judge who tried the case.

1. There was evidence that the libellee was guilty of cruel and abusive treatment of the libellant, even to the extent of inflicting considerable injury upon her person by violence. There was also evidence tending to show that he was cruel and abusive in other ways, so that her health was materially affected by his conduct.

2. The judge ruled that her letter to him written on September 23, 1895, "if accepted and acted on by him, is conclusive evidence of condonation of all causes of divorce then known to the libellant, unless the libellee was guilty of such subsequent misconduct as legally to invalidate the same." To revive a cause of divorce for cruelty it is not necessary that the subsequent misconduct should be sufficient of itself to warrant a decree for divorce without regard to the previous cruelty. It is enough if there is such frequent unkindness or persistent ill treatment as to warrant a well grounded belief that, if the cohabitation continues, the ill feeling will quickly break out in acts of gross cruelty. *Gardner* v. *Gardner*, 2 Gray, 434. *Robbins* v. *Robbins*, 100 Mass. 150. *Smith* v. *Smith*, 167 Mass. 87. *Johnson* v. *Johnson*, 1 Ed. Ch. 439. *Threewits* v. *Threewits*, 4 Desaus. Eq. 560. *Armstrong* v. *Armstrong*, 27 Ind. 186. *Farnham* v. *Farnham*, 73 Ill. 497.

3. There was abundant evidence that the libellee broke the condition of his wife's condonation. She was then pregnant, and her condition of health called peculiarly for kind and tender treatment from her husband. It is unnecessary to review the testimony. There was evidence of great unkindness on his part, manifesting itself in a variety of ways, and materially affecting her health. The rulings and refusals to rule were correct.

Exceptions overruled.

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GUSTAVUS V. HALL *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. March 26, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Due Care — Negligence.

An action for personal injuries sustained in consequence of being struck by an electric car on the cross walk of a street cannot be maintained when it appears that the plaintiff, who had good eyesight but was very deaf, at midday undertook to cross a street in a city at a place where cars and vehicles were almost constantly passing, without looking to the right or left, although there was evidence that the street was free from vehicles for a considerable distance in the direction from which the street car was approaching, and the plaintiff testified that, if he had looked in that direction, he could have seen a distance of three or four hundred feet, and also testified that he saw nothing approaching, and did not know when he was struck.

TORT, for personal injuries occasioned to the plaintiff in consequence of being struck by an electric car while crossing the street.

Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff, who was of advanced age, and who, though very deaf, had good eyesight, undertook to cross Canal Street in the city of Boston, from the corner of Sudbury Street to the Boston and Maine Railroad Station, at about midday on February 16, 1893, and when he reached the farther of the two car tracks running through Canal Street he was struck and knocked down by a South Boston electric car belonging to the defendant, and received the injuries complained of.

The plaintiff testified that, when he undertook to cross the street, the crossing was perfectly clear except that there was a young woman a few seconds ahead of him; that there were no teams or vehicles in his way; that he heard no noise until after he was struck; and that he did not know when he was struck.

On cross-examination the plaintiff testified that what he meant by the crossing being clear was that it was free from ice and snow; and on redirect examination he testified that before cross-

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ing he had looked only straight ahead; that if he had looked in the direction of the car he could have seen a distance of three or four hundred feet; but that he saw nothing approaching.

This was all the material evidence in the case relative to the manner in which the accident occurred. But there was testimony for the plaintiff that the car was not going faster than three or four miles an hour, and that it was stopped when the forward end had gone ten or fifteen feet beyond the cross walk.

At the close of the plaintiff's case, the judge ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

J. R. Murphy, (*R. S. Hall* with him,) for the plaintiff.

W. B. Sprout, for the defendant.

KNOWLTON, J. There is no absolute rule of law that, to be in the exercise of due care, one about to cross a public street must look and listen for approaching vehicles. *Robbins* v. *Springfield Street Railway*, 165 Mass. 30. He must do for his safety what ordinarily careful persons are accustomed to do under like circumstances.

Soon after twelve o'clock in the daytime, the plaintiff was about to cross Canal Street in Boston, at a place where cars and other vehicles are almost constantly passing. He had good eyesight, but was very deaf. The evidence tended to show that the street was free from vehicles for a considerable distance in the direction from which the car was approaching, and the plaintiff testified that, if he had looked in that direction, he could have seen a distance of three or four hundred feet. He also testified that he saw nothing approaching, and did not know when he was struck. None of his witnesses testified that the car which struck him was going faster than three or four miles an hour; and it appears to have been stopped when the forward end of it had got only ten or fifteen feet beyond the cross walk.

We are of opinion that all the evidence fails to show that the plaintiff was in the exercise of due care. His want of hearing made it incumbent upon him to be more alert in the use of his other senses. For him to cross in such a place, where he could not fail to know that passing vehicles were constantly to be expected, in such a state of inattention that he knew nothing of the approach of the car until after he was struck, shows a want of ordinary care.

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It is not necessary to decide that there was or was not evidence of negligence on the part of the defendant. If there was any, it was very slight. The motorman, while going at the rate of three or four miles an hour, had no reason to expect that a man crossing on the walk would step immediately before the car where it would run over him. As he saw the plaintiff approaching he would naturally expect that he would either hurry across before the car, or stop before stepping on the track, and let the car pass by. *Exceptions overruled.*

EDWARD P. BLISS & another *vs.* THEODORE C. HURD.

Suffolk. March 26, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Practice — Removal of Actions from Superior to Supreme Judicial Court — Statute.

The St. 1892, c. 169, entitled "An Act relative to the jurisdiction of the Supreme Judicial and Superior Courts in real actions," takes away the right of removal from the Superior Court to the Supreme Judicial Court of all actions at law and of petitions for partition which previously could have been so removed under Pub. Sts. c. 152, §§ 7, 8.

PETITION, for a writ of mandamus to compel the Clerk of Courts for the county of Middlesex to transfer an action of contract, with the papers therein, from the Superior Court to the Supreme Judicial Court, and to receive and enter the same therein at the charge of the petitioners upon the payment of the entry fee. Hearing before *Morton*, J., who, at the request of the parties, reported the only question raised for the consideration of the full court. The facts appear in the opinion.

R. P. Clapp, for the petitioners.

No counsel appeared for the respondent.

FIELD, C. J. The question in this case is whether St. 1892, c. 169, § 2, takes away the right of removal from the Superior Court to the Supreme Judicial Court of petitions for partition and of all actions of law which previously could have been so removed under Pub. Sts. c. 152, §§ 7, 8, or whether the right

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of removal is taken away only in petitions for partition, in writs of entry for the foreclosure of mortgages, and in other real actions. See St. 1885, c. 384, § 14.

The argument on the side of the petitioners is, that St. 1892, c. 169, is entitled "An Act relative to the jurisdiction of the Supreme Judicial and Superior Courts in real actions"; that the first section takes away the original jurisdiction of the Supreme Judicial Court only in petitions for partition, in writs of entry for the foreclosure of mortgages, and in other real actions; and that it is not to be presumed that it was intended by the second section to take away the right of removal in other actions at law than those included in the title of the act, and those over which the original jurisdiction of the Supreme Judicial Court is taken away by the first section.

The language of the second section is express, that the right to remove "actions and petitions" existing at the date of the act, by virtue of Pub. Sts. c. 152, §§ 7, 8, and c. 178, § 13, "is hereby taken away." The provisions of the statutes which relate to the original and concurrent jurisdiction over actions at law of the Supreme Judicial Court and of the Superior Court are not referred to in the statute of 1892. See Pub. Sts. c. 150, § 5; c. 152, § 4. It often happens that two courts have concurrent jurisdiction over actions, and yet there is no right of removal of such actions from one to the other or from the inferior court to the superior court. The right to remove an action from one court to another does not depend upon the original jurisdiction of the court to which the action is removed, but upon the terms of the statute authorizing the removal. If the intention of the Legislature in enacting St. 1892, c. 169, had been to take away the right of removal of actions only when the actions were real, it properly should have used in the second section of the statute the same language descriptive of the actions as is used in the first section. Instead of doing this the Legislature used language in the second section which is general, and which must be taken to describe and include all actions at law which could have been removed under Pub. Sts. c. 152, §§ 7, 8. We are of opinion that the right to remove the action of contract in the present case was taken away by St. 1892, c. 169, § 2, and that the petition should be dismissed. *So ordered.*

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GEORGE E. ROBINSON *vs.* CHARLES E. HODGKINS & another.
JAMES G. WALKER *vs.* SAME.

Suffolk. March 26, 29, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Liability of Partnership for Goods sold and delivered after Appointment by this Court of Custodian of Partnership Funds — Receiver.

In a suit for the winding up of a partnership the appointment by this court, by agreement of the partners, of a person "to take possession and control of . . . all business and property of the firm, with authority and power to pay all bills for current expenses, for said fund, after said bills shall have been approved by both of said parties," is not the appointment of a receiver to whom only a person who had sold and delivered goods to the partnership, after the appointment, should look for payment; but even though the person so appointed should be considered as a receiver, having exclusive charge of the business, yet, in an action against the partnership for the price of the goods so sold and delivered, where the evidence showed that after the dissolution of the partnership one of the defendants ordered goods of the plaintiff, who had no notice of the dissolution, in the same manner as before, and assured the plaintiff that either one of the defendants was able to pay the bill, that the goods were at no time ordered by any one other than the defendants, and that the plaintiff understood he was selling to the partnership, it was proper for the presiding judge to submit to the jury the question whether the goods were purchased of the plaintiff by the receiver or by the defendants.

TWO ACTIONS OF CONTRACT, for goods sold and delivered. At the trial in the Superior Court, before *Sheldon*, J., the jury returned a verdict for the plaintiff in each case; and the defendant Gay alleged exceptions, the nature of which sufficiently appears in the opinion.

R. Lund, for the defendant Gay.

H. A. Richardson, for the plaintiffs.

HOLMES, J. These are actions against the proprietors of a restaurant for goods sold and delivered to it in the summer and autumn of 1894. They are defended only by one of them, Gay. The defence to be considered is, that before the goods were sold a third person had been appointed by this court by agreement of the proprietors in a suit for the winding up of their partnership "to take possession and control of . . . all business and property of the firm, with authority and power to pay all bills for current

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expenses, for said fund, after said bills shall have been approved by both of said parties." It is argued that this was the appointment of a receiver, and that thereafter persons selling goods to the restaurant could look only to him. This is insisted on by the defendant as matter of law, on exceptions to the refusal of rulings asked to that effect.

We are of different opinion. In the first place, we do not interpret the order as having the scope attributed to it. We think that it only purports to appoint a satisfactory neutral custodian of the partnership funds pending the suit, with no authority to contract bills, but only with the duty to receive the money coming in, and to pay it out so far as he was directed by the partners to do so. If bills were to be contracted, it was to be done by the partners, not by him. The goods sued for were furnished to the restaurant just as they had been furnished before the order of the court, so that, if the order had the limited meaning which we say, there is no question of the right of both plaintiffs to recover. It is argued that goods had not been sold on credit before the trouble. But if that be material, we derive a different conclusion from the evidence.

But even if the order be taken to appoint a receiver to carry on the business, or if, as the jury were permitted to find by the instructions given them, Stebbins, the third person appointed, took exclusive charge of the business in fact, whatever the scope of the order, still the presiding justice was right in leaving it to the jury to say whether Stebbins or the defendants purchased their goods of the plaintiffs. In Walker's case it is testified in terms that Walker had no notice of a dissolution of the firm, and that Gay purported and was understood by Walker to order goods on the old footing, as of course he could do if the parties agreed. There is evidence also that toward the end of the time covered by the bill Gay said that the plaintiff need not give himself any uneasiness as either one of them was amply able to pay the bill. This imported an admission of liability.

In Robinson's case the evidence is less detailed, but it is testified that Gay had been introduced to the plaintiff as a partner in the concern, that the plaintiff understood that he was selling to the partnership, that no one but Hodgkins or Gay ordered goods during the time in question, and that Gay was in the plaintiff's

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place during the spring and summer, and sometimes ordered goods and paid bills. Indeed, Gay himself impliedly admits that he may have done so, although he says if he did it was only by Stebbins's instructions.* Stebbins, however, says that he understood the order of the court as we do, that he did not interfere with the business at all, but told the defendants that the conduct of the business rested with them, that they assented so far as possible under the order, and that he never authorized any one to buy goods.

We have said nothing of the decree of dissolution made on January 18, 1895, as of March 10, 1894, because of course this could not affect the previous dealings of the plaintiffs. If there was an actual dissolution in March, the jury were warranted in finding that the plaintiffs had received no notice of it.

Exceptions overruled.

GARRYT D. MITCHELL *vs.* WILLIAM A. PACKARD.

Norfolk. March 29, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Lien of Architect for Preparation of Building Plans and Supervision.

A lien may be maintained by an architect, under Pub. Sts. c. 191, § 1, for labor performed by him in the supervision of the erection of a building, but not for the preparation of plans and specifications therefor.

PETITION by an architect to enforce a lien, under Pub. Sts. c. 191, for the preparation of plans and specifications, and for the supervision of the erection of a building. Hearing in the Superior Court, without a jury, before *Dunbar*, J., who found that the usual and ordinary charge for the services of an architect in the preparation of plans and specifications and the supervision of the erection of a building is five per cent upon the actual cost of the building, of which three and one half per cent is for the

* The defendant Gay testified, "If I ever paid any bill it was in conformity with instructions from Mr. Stebbins, if he requested me to do it."

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preparation of plans and specifications, and the remaining one and one half per cent is for the supervision. The judge ruled that the petitioner was entitled to maintain his lien for his services of supervision, and established the lien at $73.27, which was one and one half per cent of the amount actually expended upon the building. To this ruling both parties excepted, and, at their request, the judge reported the case for the determination of this court. If the ruling was right, the petitioner's lien was to be established for $73.27; otherwise, there was to be a new trial.

R. Lund, (*C. F. Atwood Smith* with him,) for the petitioner.

J. J. Higgins, (*W. M. McInness* with him,) for the respondent.

KNOWLTON, J. The questions presented by this case are, first, whether an architect, who has drawn plans and prepared specifications for the construction of five houses under a contract to draw the plans and specifications and supervise the construction of the houses, and who has supervised the construction of one of the houses until it was about half completed, and supervised the work of putting in the foundations of two of the others, involving an expenditure of about forty dollars upon one, and about fifteen dollars upon the other, can have a lien under the Pub. Sts. c. 191, for the whole amount due him; and secondly, if he cannot, whether he can have a lien for the value of his services in supervising the work upon the buildings, considered apart from the preparation of the plans and specifications.

The statutes of the different States in regard to mechanic's liens differ materially in their provisions, and the cases show a considerable conflict of authority upon the questions before us. But we are of opinion that, under statutes similar to ours, the weight of judicial opinion is in favor of holding that the services of an architect in preparing plans and specifications for a building are not the kind of labor intended to be protected by the statute, and, on the other hand, that services upon a building in supervising the work of construction enters directly into the construction so as fairly to be called "labor performed or furnished . . . and actually used in the erection" of a building, within the meaning of these words in § 1 of the statute above cited. It is also generally held that the fact that one who does such work is an architect does not prevent him from recovering for this kind of service, which is often performed by an intelligent me-

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chanic. This is the doctrine of the highest court in Pennsylvania, where the provisions of the statute are similar to ours. *Price* v. *Kirk*, 90 Penn. St. 47. *Rush* v. *Able*, 90 Penn. St. 153. *Bank of Pennsylvania* v. *Gries*, 35 Penn. St. 423. Under a like statute in Missouri, it was held in *Raeder* v. *Bensberg*, 6 Mo. App. 445, that the services of an architect "in drawing plans and specifications and giving directions to the builder under whose special superintendence the house is being erected cannot be called, in any proper sense of the words, 'work or labor upon the building.'" A similar decision was made in *Foushee* v. *Grigsby*, 12 Bush, (Ky.) 75. *Ames* v. *Dyer*, 41 Maine, 397, was a case arising under a statute giving a lien for labor performed, or materials furnished "for or on account of any vessel building or standing on the stocks," etc., and the attempt was to establish a lien for a mould constructed and used to form the timbers for a ship. The court said that "the plan of a house, the model of a ship, the moulds by which its timbers are to be hewed, may be necessary and even indispensable, but they do not enter into any structure so as to be a part of its materials, and cannot be regarded as within the provision of the statute."

The liens with which we are dealing are commonly called mechanic's liens in the statutes and opinions, and we have no doubt that the primary purpose of the Legislature in providing for them was to protect persons engaged in manual labor, as distinguished from those in the learned professions, or others whose activities are chiefly mental. We do not mean to say that the terms of our present statute exclude those whose mental labor is expended directly upon the construction of the building itself, and who do little with their hands, but they are not primarily within the consideration of the Legislature. The St. 1851, c. 343, is entitled "An Act to secure to mechanics and laborers their payment for labor, by a lien on real estate." The St. 1852, c. 307, embraces the same purpose in its title, while the St. 1855, c. 431, is entitled "An Act to secure to mechanics and others payment for labor and materials by them expended." While these statutes have been extended by subsequent legislation so as to include labor furnished, as well as labor performed, there is no indication in the legislation of a purpose to change the meaning of the word "labor." See *Crowell* v. *Cape Cod Ship Canal Co.*,

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ante, 157; *Pennsylvania & Delaware Railroad* v. *Leuffer*, 84 Penn. St. 168; *Ericsson* v. *Brown*, 38 Barb. 390.

The preparation of plans and specifications is a preliminary to the construction of a building, and is often merely tentative. It may or may not be followed by a construction according to the plans. It is seldom that either the external or internal form of a building is determined upon, or that its identity is anything more than an indefinite mental conception until after the plans have been completed. We are of opinion that this professional work of the architect, in bringing into existence the definite form and conception of a building which may be erected if the landowner adopts the plan, is not "labor performed or furnished . . . and actually used in the erection" of a building, within the meaning of our statute.

We are of opinion that the work of supervision which is done directly upon the building, and which is partly physical, but in its more important part mental, may be the subject of a lien under our statute, even if done by the same person who prepared the plans as an architect. Where such work is done under an entire contract for a round sum, which covers compensation for other work which is not the subject of a lien, it may be difficult to separate the part of the price which belongs to this work from that which belongs to the other, and in such a conceivable case it might be impossible to establish a lien for anything. In the present case, no sum was agreed upon for the whole or for any part of the petitioner's services, and the judge has found that a certain price is ordinarily allowed in such cases for supervision.

Judgment on the finding.

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COMMONWEALTH *vs.* ELLEN M. ABBOTT & another.

Suffolk. March 29, 1897. — May 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Recognizance — Married Woman.

A married woman may enter into a recognizance.

It is no defence to an action on a recognizance in the Superior Court that one substantially similar in all respects had been entered into by the parties before the police court from which the appeal was taken.

CONTRACT, on a recognizance against Maria E. Sprague and Ellen M. Abbott, bail of Nellie McFadden. At the trial in the Superior Court, without a jury, before *Wardwell*, J., it appeared that the original action in which the first recognizance was given was a complaint to the Police Court of Chelsea against McFadden for maintaining a liquor nuisance. The defendants filed special answers in abatement, alleging grounds stated in the opinion. To these answers the Commonwealth demurred, and the demurrers were sustained. The defendants then filed general answers. The judge gave judgment for the Commonwealth; and the defendants alleged exceptions, the nature of which appears in the opinion.

J. E. Bates, for the defendants.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

HOLMES, J. This case comes before us upon exceptions to the entry of judgment upon a recognizance given in a criminal case in the Superior Court. The facts upon which it is contended that the recognizance is void are, first, that one of the defendants is a married woman, and owns real estate in which her husband has an initiate right of curtesy, and that he did not consent to her making the contract; and, secondly, that a recognizance substantially similar in all respects had been entered into by the parties before the police court, and that the Superior Court had no right to require the one in suit.

Both grounds are insufficient. The first contention is disposed of by the statute as to married women. Pub. Sts. c. 147,

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§§ 2, 7. With regard to the second, whatever may be the practice elsewhere, *Regina* v. *Shirley*, 7 Jur. 1038, it is the established practice here when the prisoner is before the court to order a new recognizance if the court believes or apprehends that the old one is insufficient. No doubt that was the case here, and upon further examination the sureties satisfied the court of their sufficiency. There is no ground for the suggestion that it was requiring excessive bail, even if the second recognizance did not supersede the first, which we do not intimate. It is unnecessary to consider other answers to this part of the case.

Some suggestion of variance was made in the answers, but it is enough to say that this was waived in the Superior Court.

Exceptions overruled.

WILLIAM T. WAY *vs.* CHARLES F. MURPHY & another.

Suffolk. January 20, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Bond to dissolve an Attachment.

In an action against the sureties on a bond to dissolve an attachment, even if it is assumed that the contention of the defendants is correct that they only agreed, so far as the principal is concerned, to pay such judgment as might be recovered against it as an unincorporated association of individuals, and the only judgment recovered was against it as a corporation; yet that does not relieve them, if they also agreed to pay such judgment as might be rendered against either or both of them, and in the action to which the bond refers judgment was rendered against both as well as against the principal, and no part of it has been paid.

CONTRACT, on a bond dated March 13, 1895, executed by the Allston Real Estate Company, an unincorporated association of individuals, as principal, and Charles F. Murphy and Joseph Lewenberg, as sureties. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

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G. R. Swasey, (*M. P. Spillane* with him,) for the defendants.
J. W. Keith, for the plaintiff.

MORTON, J. This is an action against the defendants as sureties on a bond given to the plaintiff by "the Allston Real Estate Company, an unincorporated association of individuals," to dissolve an attachment. The suit in which the bond was given is described in the bond as brought by the plaintiff against "said Allston Real Estate Company, Samuel Hano, and James F. Mullen," and the date of the writ, the court to which it was returnable, the names of the parties, and other particulars are given, so that there can be no doubt what action was referred to, and for aught that appears the attachment in the action thus referred to was dissolved by the bond.

The defendants contend that they agreed by the bond to pay any judgment which might be rendered against the Allston Real Estate Company as an unincorporated association of individuals if the company did not pay it within thirty days, and that no judgment was rendered against it as an unincorporated association of individuals, but only as a corporation, and therefore they are not liable. Their contention is in substance that this was the only liability which they assumed. But we think that the bond sets forth an obligation on their part to do more than that. They agreed that, "if the above bounden Allston Real Estate Company shall pay to the plaintiff in said action the amount, if any, that he may recover therein within thirty days after the final judgment in said action from said Allston Real Estate Company, Mullen, or Hano, . . . then the above written obligation shall be null and void; otherwise, to remain in full force and virtue." And the same language is repeated later in the bond, in connection with the entry of any special judgment. That is, granting that the contention of the defendants is right, that they only agreed, so far as the Allston Real Estate Company is concerned, to pay such judgment as might be recovered against it as an unincorporated association of individuals, and that no such judgment has been recovered against it, that does not relieve them, because they not only agreed to pay any judgment that might be rendered against the Allston Real Estate Company, but also such judgment as might be rendered against Mullen or Hano, or both, and it is agreed that in the action to which the

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bond refers judgment was rendered against Mullen and Hano, as well as against the Allston Real Estate Company, and that no part of it has been paid. The defendants are liable, therefore, according to the express terms of the bond.

It is possible that the parties intended to bind themselves to pay only such judgment as might be recovered against the company, and counsel for both parties have argued as if that were so, but we must take the instrument as we find it.

It is not contended that the bond was not so executed as to bind the company as an unincorporated association, and the objection has not been taken that the principal should have been joined. *Tapley* v. *Goodsell*, 122 Mass. 176, 181.

It is plain that the Allston Real Estate Company as an unincorporated association and the defendants could bind themselves, in consideration of the release of an attachment on the property of other parties, to pay such judgment as might be rendered against such parties or any of them.

Judgment for the plaintiff for the penal sum of the bond affirmed.

ERASTUS WORTHINGTON, JR. *vs.* PLYMOUTH COUNTY RAILROAD COMPANY.

Norfolk. March 4, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Contract — Evidence — Presumption against Gratuitous Service.

At the trial of an action to recover for engineering work performed in laying out, locating, and determining the permanent location of a railroad, under a written agreement whereby the plaintiff was to receive three thousand dollars in monthly instalments proportional to the amount of work done, until the whole work of location should be finished and the whole sum paid, and where there was no controversy that the work was seasonably done, a request for a ruling that no action would lie upon the agreement until the completion of the railroad, if it was built, or until the expiration of its charter, was properly refused, and the jury were properly instructed that by the terms of the contract the whole sum was due, and should have been paid when the plaintiff finished the work of fixing the location.

There is no presumption that work not ordinarily bestowed in charity is gratui-

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tously performed, either for natural persons or for corporations, merely because at the time the recipient has no pecuniary resources, especially when the work is done for a railroad corporation empowered to construct a railroad for pecuniary gain.

CONTRACT, on a written agreement, and on an account annexed, to recover for services rendered as an engineer in laying out and locating the defendant's railroad, and in preparing the plans required for its construction.

The first count of the declaration alleged that, on February 11, 1895, the defendant entered into a written contract with the plaintiff for certain engineering work; that, in accordance with the terms thereof, the plaintiff made the surveys necessary to fix and determine the location of the defendant's road, and made the permanent location plans, and in all other respects performed the work required of him, wherefore there was due to him from the defendant, on April 6, 1895, the sum of three thousand dollars, which the defendant though requested refused to pay.

The second count alleged that on April 6, 1895, the defendant owed the plaintiff the sum of three thousand dollars, according to the terms of a written agreement entered into by them on February 11, 1895.

The third count alleged that, between January 2, 1895, and February 25, 1896, the plaintiff, at the request of the president of the defendant company, and in accordance with the orders and directions of the defendant made certain plans, profiles, estimates, and calculations, for which there was due to him according to an account thereto annexed the sum of $642.99.

The agreement referred to in the plaintiff's declaration, executed February 11, 1895, provided that, in consideration of the sums to be paid to the plaintiff by the defendant in the manner and at the time therein specified, the plaintiff agreed to perform all the engineering work, superintendence, and preparation of plans required in laying out, locating, and determining the permanent location of the Plymouth County Railroad Company, and in laying out, building and constructing the road-bed, tracks, sidings, bridges, stations, platforms, and other work provided for; that he would perform all such work under the direction and to the satisfaction of the directors, and render monthly statements of the amount of work done under each item of the contract; that,

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in consideration of the faithful performance of his undertakings by the plaintiff, the defendant agreed to pay to him the sum of three thousand dollars, by paying each month such a proportion thereof as the work done by the plaintiff should bear to the whole amount of work to be done, until the whole work of location should be completed and the whole sum paid, and that his compensation for the engineering work and superintendence required in the work of construction was to be a sum equal to six per cent of the amount of work done under his supervision, payable monthly upon the amount of work so done during the previous month.

Answer as to each count a general denial, and as to the third count that, if the services were performed by the plaintiff, they were rendered by him gratuitously, without the intention on his part of charging for them, and without expectation on the part of the defendant of paying for them.

At the trial in the Superior Court, the president of the defendant company, called as a witness for the company, was asked whether before entering into the contract he had any conversation with the plaintiff as to the financial standing of the corporation, or informed him as to such financial standing. The question was excluded, and the defendant's counsel excepted, stating that he intended to prove that the plaintiff was informed of the financial condition of the corporation before and when the services charged in certain items of the third count were performed, and as applying to the defence that, if the services were performed, they were gratuitous.

At the close of the evidence, the defendant requested the judge to rule that the contract in writing was an entire contract, and no recovery could be had and no suit be commenced thereon until the completion of the construction of the railroad therein named, or, in case of no construction, until April 6, 1897, at which time the charter would expire if the road was not constructed.

Dunbar, J. declined to rule as requested, and instructed the jury that they would find by the agreement that the plaintiff agreed to do all the engineering work required in laying out, locating, and determining the permanent location of the defendant's railroad, and in the preparation of plans required for the determining and fixing of such location; that such work was to

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be done so that the plans could be filed on April 6, 1895, the date limited by the defendant's charter, and that for such work the defendant agreed to pay to the plaintiff three thousand dollars; that it was not contended that the work was not done by the plaintiff, or within the proper time, so that the defendant was enabled duly to file its plans; and that if the plaintiff had received no compensation for his work he was entitled to recover.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. B. Grant, for the defendant.

R. M. Saltonstall, for the plaintiff.

BARKER, J. The ruling that no suit could be commenced and no recovery be had upon the written contract until the completion of the railroad, or, if the road was not built, until the defendant's charter expired, was properly refused. The plaintiff agreed to do all the engineering work required in laying out, locating, and determining the permanent location of the railroad, and in the preparation of plans required for the location, and also to do all engineering work and superintendence required to lay out, build, and construct the road-bed, track sidings, bridges, stations, platforms, and other work provided for. But his compensation for the work and plans required in making the location was fixed at the sum of three thousand dollars, and the defendant agreed to pay that sum by paying each month such a proportion thereof as the work done by the plaintiff should bear to the whole amount of work to be done, until the whole work of location should be finished and the whole sum paid, while his compensation for the engineering work and superintendence required in the work of construction was to be a sum equal to six per cent of the amount of work done under his supervision, and was to be paid monthly upon the amount of work so done during the previous month. By the terms of the contract itself the three thousand dollars was wholly due, and should have been paid when the plaintiff finished the work required in fixing the location.

The exception to the ruling given upon this branch of the case must also be overruled. It stated correctly the substance and legal effect of the contract, so far as the compensation of the plaintiff for his work in locating the railroad was concerned, and there being no controversy that the work had been seasonably

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done by the plaintiff, it was correct to instruct the jury that, if the defendant agreed by the contract to pay the plaintiff three thousand dollars for the work, he was entitled to recover it in the action.

The other exception is to the exclusion of evidence. The first and second counts were for breach of the contract. In the third count the plaintiff sought to recover for certain work done at the defendant's request, outside of the written contract. One of the defences to this count was, that, if the services were performed they were performed gratuitously, without intention on the part of the plaintiff of charging for them, and without expectation on the part of the defendant of paying for them. This count was submitted to the jury, and a recovery upon it is included in the verdict.

The president, being called as a witness for the defendant, was asked whether before entering into the contract he had any conversation with the plaintiff as to the financial standing of the corporation, and whether he informed the plaintiff as to its financial standing. The question was excluded, the defendant's counsel stating that he intended to prove that the plaintiff was informed of the financial condition of the corporation before and when the services charged in certain items of the third count were performed, and as applying to the defence that if the services were performed they were gratuitous.

The defendant now contends that the evidence was admissible upon the counts upon the written contract, and upon the third count. Upon the first part of the contention it would be enough to say that the bill of exceptions shows that the evidence was offered only as affecting certain specified items of the account annexed to the third count. Besides this, as applied to the counts upon the written contract, the evidence was inadmissible as tending to contradict the writing, which in explicit terms promised payment for the services to be rendered under it.

We are of opinion that the evidence was properly excluded. If we assume that at the time to which the testimony offered was directed the corporation had no assets, that state of facts is consistent with the expectation that services rendered to the corporation should be paid for. It is not to be presumed that work which is not ordinarily bestowed in charity is gratuitously per-

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formed, for either natural persons or for corporations, merely because at the time the recipient has no pecuniary resources. Still less does such a presumption obtain when the work is done for a quasi public corporation, empowered to construct for the pecuniary gain of its members a railroad for which a public exigency must have been found to exist. See *Bliss* v. *Johnson*, 162 Mass. 323; *Clark* v. *Fletcher*, 1 Allen, 53, 56; *Burke* v. *Kaley*, 138 Mass. 464. *Exceptions overruled.*

DANIEL DACEY, administrator, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

DANIEL DACEY & another *vs.* SAME.

Suffolk. March 11, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Master and Servant — Personal Injuries and Death — Absence of Evidence as to Mode of Death — Evidence of Precautions subsequent to Accident.

In an action under St. 1887, c 270, §§ 1, 2, and amendments thereof, brought by the administrator or next of kin of a person who was killed while in the performance of his duties as a switchman for the defendant, it is necessary for the plaintiff to show by affirmative proof that the deceased, when killed, was in the exercise of due care, and where the evidence leaves the manner in which the death occurred merely to conjecture, such action cannot be maintained.

Evidence of precautions taken subsequent to the occurrence of an accident is not competent to show prior negligence of the defendant.

TWO ACTIONS OF TORT, under St. 1887, c. 270, § 1, as amended by St. 1893, c. 359, and under § 2, brought by the administrator of John Dacey to recover for the conscious suffering of his intestate, and by the next of kin of the intestate to recover for his death without conscious suffering, in consequence of an accident which occurred near a switch in the defendant's freight yard at Attleborough on the night of March 30, 1894, while the deceased was engaged in the performance of his duties as a switchman on a freight train of the defendant.

Trial in the Superior Court, before *Lilley*, J., who ruled that the actions could not be maintained, and directed a verdict in

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both cases for the defendant; and the plaintiffs alleged exceptions. The material facts appear in the opinion.

M. J. Sughrue & J. J. McCarthy, for the plaintiffs.

C. F. Choate, Jr., for the defendant.

BARKER, J. The verdicts were rightly ordered, because the evidence would not support a finding that when the deceased was injured he was in the exercise of due care. Such a finding would be only a conjecture. No one saw him at the time of the accident. If we assume that he was hurt by coming in contact with the switch, the evidence does not disclose how or why he struck it, or what he was doing at the time. When last seen before the accident he was walking upon the ground sixty feet or more from the switch, with a lantern in his hand going away from the switch and towards the rear car of four box freight cars which were approaching the switch and approaching the deceased, and upon which he was expected to ride to another switch which it would be his duty to turn. The only witness who saw him was upon the top of the rear car, and this witness testified that the deceased came walking up to get a ride on that car; that he did not see the deceased get on, but knew he was going to get on because he came right over to the car, and that when he last saw him he was approaching the car with his lantern in his hand. When the car was opposite the switch the witness heard a "bang," the switch shook, and the light on the top of it went out. When about ten or twelve feet farther along, the forward trucks of the rear car went off the rails, and the witness laid down and looked backward, and saw a light in the middle of the track. He then jumped off the car, went back, and found the deceased, with his lighted lantern on his arm, fatally injured on the track, at a point ten or twelve feet from the switch, and on the opposite side of it from the point where he was last seen before the accident. The additional fact, that the board of the switch was found to be split and its frame bent, makes it probable that the deceased, having got upon the car, was carried against the switch, but even this is uncertain. There was no ladder on the side of the car, and there was a stirrup and a grab-iron on the right hand side at the front end. There was a similar stirrup and a grab-iron on the left hand side of the car at the rear end, and there was a ladder on the right hand side of the

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front end of the car, and another ladder on the left hand side of the rear end. Whether the deceased had got on board of the car, or, if we infer that he had, how he did so, and in what position he was when injured, can only be conjectured. It was for the plaintiffs to show by affirmative proof that he was in the exercise of due care, and because the evidence left it to conjecture, the verdicts for the defendant were rightly ordered. Besides this, the deceased had assumed as an ordinary risk of his work the possibility that, when boarding freight cars or riding on them, he might come in contact with switches or structures near the tracks. See *Bell* v. *New York, New Haven, & Hartford Railroad*, *ante*, 443, and cases cited. The switch had long been in the same location, he had passed it many times a week for months, and the mere fact that after the accident the switch was found bent toward the track was not evidence that it was out of plumb before the deceased came in contact with it.

The evidence that a switch of a different kind was substituted after the accident was properly excluded. Precautions subsequently taken are not competent to show that the defendant was negligent before. *Shinners* v. *Proprietors of Locks & Canals*, 154 Mass. 168. *Menard* v. *Boston & Maine Railroad*, 150 Mass. 386. *Downey* v. *Sawyer*, 157 Mass. 418.

Exceptions overruled.

CHARLES E. ABBOTT, administrator, *vs.* GEORGE A. DOWNS & another.

Middlesex. March 17, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Petition of Administrator to sell Real Estate of Intestate — Laches.

In this case a petition to the Probate Court for license to sell the real estate of the intestate for the payment of debts and the charges of administration, brought nearly seventeen years after the petitioner was appointed administrator, was granted, the judge having found that one of the appellants who claimed title by deed took with full knowledge of all the equities, and that the petitioner had not been guilty of laches.

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APPEAL from a decree of the Probate Court, allowing the petition of the administrator of the estate of Michael Dempsey to sell real estate of the intestate for the payment of debts and charges of administration.

Hearing before *Barker*, J., who reserved the case for the consideration of the full court, in substance as follows.

The petition, dated December 16, 1895, was to the Probate Court for the County of Middlesex, for license to sell, for payment of the debts of the intestate and charges of administration, real estate in Malden. A decree was entered on October 6, 1896, granting the license, from which an appeal was claimed by George A. Downs and Albert W. Cooke, both of Malden, which appeal was entered in this court on November 2, 1896. The petitioner was appointed administrator on February 11, 1879. The inventory showed no personal estate, and real estate appraised at $250, being the real estate described in the petition, and an equity of redemption in a parcel of land adjoining, appraised as of no value above the mortgage thereon (now owned by said administrator) and accrued interest.

An account was filed by the administrator on June 23, 1885, showing amount received $2.93, and amounts paid out aggregating $52.27, which account was duly allowed. The list of debts accompanying the administrator's petition for license to sell included, in addition to a number of claims now barred by the statute of limitations, the balance due as shown by the account, and certain personal claims due from the intestate to the administrator, and claims for the charges of administration and the expenses of the suit in equity hereinafter mentioned; and the administrator afterwards received rents as mortgagee in possession of the last mentioned parcel of land, and the sum of fifty dollars from one Damon, a defendant in the equity suit, as costs.

On March 1, 1879, the administrator, having discovered that a mortgage, given by the intestate upon the real estate described in the petition and another parcel adjoining the same, was advertised to be foreclosed, and the real estate described in this petition to be sold on March 3, under the power of sale therein contained, for alleged breach of condition thereof, brought a bill in equity, claiming that the mortgage had been paid, and was discharged; and also that a certain deed of the real estate described

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in the petition, absolute in form, given by the intestate to one Hill, was merely an equitable mortgage, and asking for leave to redeem the same, in order that it might thereafter be sold by him, as administrator, for the payment of said debts and charges. An interlocutory injunction, still in force, was entered on said March 1, restraining the foreclosures. The justice who heard the bill in equity found, on June 30, 1894, that the plaintiff had established his right to have the first mortgage cancelled and discharged, and to redeem from the equitable mortgage on payment of the amount found by the master and interest. The appellant Downs, who claimed by deed given in June, 1879, by Hill, to whom said deed absolute in form was given in 1878, was joined, by amendment, as a party defendant in the suit, and the appellant Cooke claimed title by virtue of a deed given thereafter by Downs, dated December 27, 1893.

The judge found that "said Cooke took said last mentioned deed with full knowledge of all the equities and under advice of counsel; that the petitioner has been guilty of no laches in respect of the prosecution of either said suit in equity or said petition, or in the matter of filing his accounts in the Probate Court, or in procuring an adjustment of his personal claims; that said estate is indebted to him for charges and expenses of administration and for certain personal claims, and there is no personal estate of said intestate sufficient to pay said claims and charges; that by a partial sale the residue of said estate described in said petition would be greatly injured; and that there was not sufficient time, after the discovery by said administrator of said attempt to foreclose said mortgage, to procure from the Probate Court a license to sell said real estate before commencing said suit in equity."

C. C. Smith, for the appellants.

S. H. Tyng, for the petitioner.

HOLMES, J. This is a petition by an administrator for leave to sell real estate for the payment of debts. The petition was granted by the Probate Court, and an appeal was taken by Downs and Cooke who set up a title in Cooke coming from the intestate by deeds absolute in form. In a suit between the present parties in which a final decree has not yet been entered, it has been found that the conveyance by the intestate was only a

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mortgage in equity, and that the petitioner is entitled to redeem. It is not necessary to consider whether under these circumstances the appellants have a *locus standi*, as we are of opinion that in any event the petition must be granted.

The only objection to the petition is that all debts due from the estate, except what is due to the petitioner, are barred long since, and that he has been guilty of laches in waiting so long, the estate meantime having changed hands. But it is found that Cooke took with full knowledge of all the equities, and under advice of counsel, and it also is found as a fact that the petitioner has been guilty of no laches. We read the finding as applying to the filing of the petition for leave to sell, as well as to the prosecution of it when filed. The evidence is not reported, and therefore, unless we could say, as matter of law, that whatever the circumstances there must have been laches in waiting so long, the petition must be granted. *Ames* v. *Jackson*, 115 Mass. 508, 511. It is impossible for us to lay down so sweeping a proposition. It follows that the petition must be granted in respect of the debt due the petitioner, although not of course, in respect of the debts due to others, and barred by the statute of limitations. *Decree affirmed.*

LUCY H. BROWN *vs.* JOHN J. O'BRIEN.

Norfolk. March 17, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Covenants not to cease with Discharge of Mortgage — Easement.

Where, the debt secured by a mortgage being payable in five years, the mortgagor covenants with the grantee and his heirs and assigns that no building or part of a building shall be erected upon the granted premises for five years from the date of the mortgage, and that no building or part of a building erected thereafter upon the granted premises shall be more than two stories in height, and that these covenants shall be binding upon and available to heirs and assigns, and run with the land for the benefit of the adjoining land of the grantee, and in the condition it is further provided that, upon payment and other performance by the grantor, the deed, with the exception of the covenants above recited, shall be void; an intention is clearly manifested that the operation of the covenants shall not cease with the discharge of the mortgage, and the cove-

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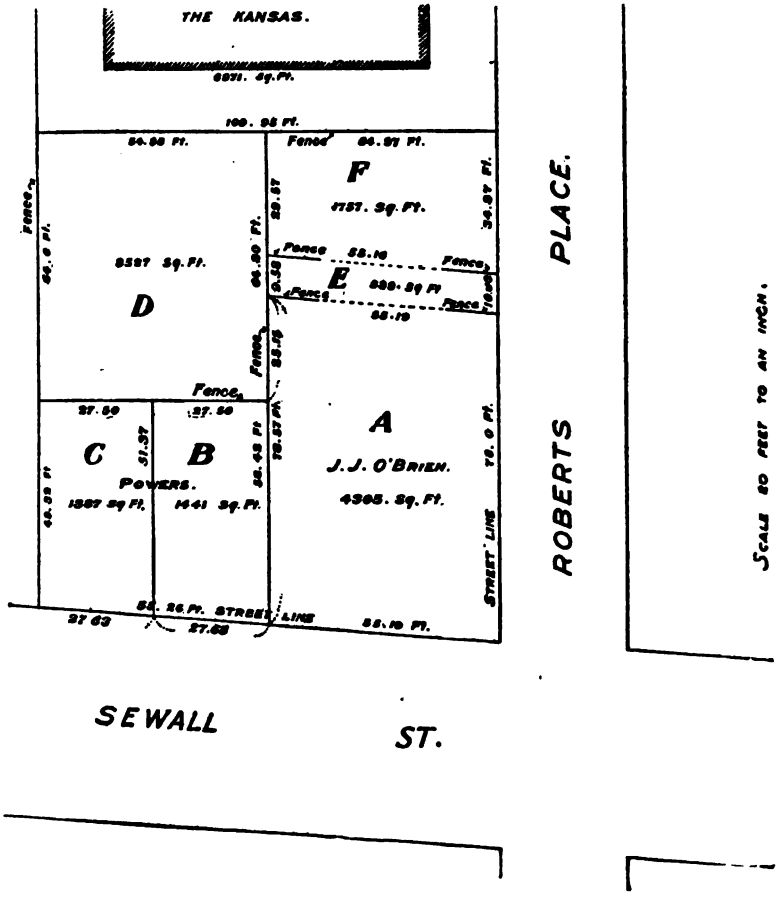
nant that the land shall not be used for buildings of over a certain height is in effect the grant of an easement in favor of the adjoining premises, the violation of which may be restrained.

BILL IN EQUITY, filed June 4, 1896, to restrain the defendant from the violation of the covenants of a mortgage deed. The case was submitted to the Superior Court, and, after a decree for the plaintiff, to this court, on appeal, upon agreed facts, in substance as follows.

On September 13, 1890, Sarah E. Lawrence was the owner in fee of the land shown as lots B, C, D, E, and F, on the subjoined plan. The defendant was the owner in fee of land adjoining the same, marked A, conveyed to him by said Lawrence by deed dated May 21, 1890, which deed contained no restrictions as to



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the character of the buildings which the defendant might erect on the land. The defendant previously to September 13, 1890, had erected on a part of his lot a three-story house, still standing. On September 13, 1890, the defendant executed to Lawrence a mortgage deed, which contained the following provision: "And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee and her heirs and assigns, that no building or part of a building shall be erected upon the granted premises for five years from the date of these presents, and that no building or part of a building erected thereafter upon the granted premises shall be more than two stories in height, or be placed within seven (7) feet of the line separating the granted premises from other land of the grantee; these covenants shall be binding upon and available to heirs and assigns, and are to run with the land hereby conveyed for the benefit of said adjoining land of the grantee"; and in the condition it was further provided that, upon payment and other performance by the grantor, the deed, with the exception of the covenants above recited, should be void. On or about May 11, 1891, while the mortgage was in full force and effect, Lawrence conveyed to the plaintiff lots D and E, which lots adjoined the lot of the defendant marked A, by deed conveying a good title in fee simple. On September 13, 1895, the mortgage dated September 13, 1890, was discharged. At the time of this discharge the estate of Mrs. Lawrence owned none of the adjoining land. The plaintiff did not know of the discharge being given until some time after it was given. Before the defendant began to erect his building upon his premises, he consulted with counsel, who communicated with the plaintiff and asked her whether, as owner of adjoining land, she had any objection to his erecting a three-story dwelling-house upon his lot. She thereupon notified him that she did object to his erecting any three-story building upon lot A, and the plaintiff at other times before the building was erected notified and warned the defendant not to erect a three-story building upon the premises, and especially called his attention to the covenants in his mortgage deed to Mrs. Lawrence, and requested him to observe the same. A temporary injunction issued on June 4, 1896, restraining the defendant from building any building on the premises above two

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stories in height, the building complained of having been begun after March, 1896, and at the date of the temporary injunction was framed for the third story. On July 18, 1896, the temporary injunction was modified "so as to permit the respondent to complete the building begun by him, without prejudice to the complainant's rights, especially without prejudice to any right the complainant may have to have the building reduced in height." It was admitted that the defendant had erected a building of three stories and a half in height on lot A, and that such building cut off the light and air from the plaintiff's building on the adjoining lot more than a building of two stories in height would, and to that extent injured the use and value of the plaintiff's building, which was away from the street and in the rear of lot A; that on lot F and on lots B and C houses had been built by Mrs. Lawrence, all of two stories in height, with French roofs, and that there were no restrictions in the deeds of the lots given by her as to the character of buildings to be maintained thereon.

A decree was entered that the defendant be perpetually restrained from erecting any building on the premises in question of more than two stories in height, and that he should forthwith reduce the height of any building erected or placed on the premises since September 13, 1890, so that the same should not be more than two stories in height; and the defendant appealed to this court.

J. R. Murphy, for the defendant.

A. H. Latham, for the plaintiff.

ALLEN, J. Where an independent covenant is inserted in a mortgage, it does not necessarily expire with the payment and discharge of the mortgage, but it is a matter of construction whether it was intended to survive the mortgage or not. *Ober* v. *Brooks*, 162 Mass. 102. *Green* v. *Low*, 22 Beav. 625. In the present case, it is quite clear that the covenant was intended to survive. The debt secured by the mortgage was payable in five years. The mortgagor covenanted with the grantee and her heirs and assigns that no building or part of a building should be erected upon the granted premises for five years from the date of the mortgage, and that no building or part of a building erected thereafter upon the granted premises should be more

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than two stories in height, and that these covenants should be binding upon and available to heirs and assigns, and run with the land for the benefit of the adjoining land of the grantee; and in the condition it was further provided that, upon payment and other performance by the grantor, the deed, with the exception of the covenants above recited, should be void. This clearly shows an intention that the operation of the covenants should not cease with the discharge of the mortgage.

The covenant that the land should not be used for buildings of over a certain height was in effect the grant of an easement in favor of the adjoining premises, the violation of which by the defendant was rightly restrained. *Chase* v. *Walker*, 167 Mass. 293. *Ladd* v. *Boston*, 151 Mass. 585. *Hogan* v. *Barry*, 143 Mass. 538. *Decree affirmed.*

JOHN FITZGERALD *vs.* MARY FITZGERALD.

Norfolk. March 18, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Equity — Cancellation of Deed — Fraud — Accident — Mistake.

A husband who has made to his wife, through a third person, a voluntary conveyance, untainted with fraud and unaffected by any declaration of trust, of the house and land which is their home, for the purpose of preventing it from being taken by his creditors, cannot thereafter maintain a bill in equity for the cancellation of the deed on the ground that it was obtained by fraud, or that it was executed by accident or mistake.

BILL IN EQUITY, filed August 31, 1891, by a husband against his wife, to procure the cancellation of a deed alleged to have been obtained from him by fraud, and to have been executed by him, without consideration, by accident and mistake.

In the Superior Court issues were framed for the jury, which were tried before *Hammond*, J., and the case was afterwards heard on its merits by the same judge, who dismissed the bill; and the plaintiff alleged exceptions. The material facts appear in the opinion, and in the notes of the reporter thereto.

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J. F. Pickering, (*J. W. Pickering* with him,) for the plaintiff.

S. W. Hatheway, for the defendant.

BARKER, J. This bill in equity, brought by a husband against his wife, alleges, in substance, that the deeds by which the title of the house and land which was their home in the year 1871 was transferred from him to his wife were without consideration, and were never delivered; that he executed them by inadvertence, accident, and mistake, believing that his ownership and control would not be affected; and that he was led to make the transfer of title by the false and fraudulent representations of his grantee, between whom and the defendant he alleges there was a conspiracy to defraud the plaintiff of his real estate. Also that it was agreed between himself, his grantee, and the defendant, that the deeds which transferred the title should have no further effect than as a provision in lieu of a testamentary disposition, but which should not affect his right to dispose of the real estate by will. There is an allegation that the plaintiff had himself acquired the property from his own means; also that in the year 1889 the defendant expelled him from the house, and from most of the land, and that she has interfered since with his use of such of the land as yet remains in his possession, and she retains forcible possession of the house, and of most of the land.

The bill then alleges that the deeds purporting to convey title to the defendant were void. That, if not void, the title which vested in the defendant was a naked legal title, held in trust to the sole and exclusive use of the plaintiff during his life, with power by his will to direct to whom the land should go in fee.

The prayers are that the deeds be declared void, and be cancelled, that the defendant shall so convey the land as to revest it in fee in the plaintiff, and for injunctions, for damages, and for general relief.

The wife's answer alleges that the property was purchased with the products of the joint labors of the plaintiff and herself; that the deeds were made at the plaintiff's request, and were delivered, and that she joined in her husband's deed and accepted the deed to herself to assist her husband, who was then in trouble and litigation, and to save herself and children their home; that there was no other consideration for the transfer, and that it was made by her husband in consideration of his

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affection for herself and children, and to preserve and protect his home. The answer denied all charges of fraud and conspiracy, and other wrongdoing, and alleged that the plaintiff voluntarily left the home because of his own misconduct.

The Superior Court submitted to a jury issues, whether the estate was purchased with the product of the joint labor of the parties, whether the transfer was the plaintiff's voluntary act, and whether he was induced to make it by the fraud or imposition of his grantee in behalf of the defendant, or by her fraud or imposition, or that of both of them.

Of these issues the first and second were found in the affirmative, and the third in the negative. At the trial of the issues the plaintiff took certain exceptions, which were entered in this court, and dismissed as prematurely entered by a decision reported in *Fitzgerald* v. *Fitzgerald*, 165 Mass. 471. Thereafter the case was heard by the Superior Court upon its merits. At this hearing no evidence was offered, but the plaintiff requested seven rulings, which the court declined to make, and ordered a final decree dismissing the bill.

The exceptions taken at the jury trial * are now overruled, not having been argued by the plaintiff, who contends that the first issue, to which alone they relate, is immaterial, and all benefit from the finding upon that issue having been waived by the defendant.

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* The defendant, subject to the exception of the plaintiff, offered to show that from money earned by her both before and after her marriage she had paid a part of the consideration for the real estate in question to the plaintiff's grantors.

The plaintiff also requested the judge to rule that by "the product of the joint labors of the parties" is meant, as matter of law, money derived from labor jointly performed by the parties, which money was received by the party or parties from whom said real estate was purchased, and who conveyed the same to the complainant; and those words do not mean money earned by each, from the labor of each, separately, and not jointly performed; [neither can those words be held to mean that the respondent, by her labor in the usual and ordinary household duties, performed for the family of herself and her husband, so contributed her labor that it may be called the joint labor of the parties, or the product of the joint labor of the parties.]

The judge gave in substance that portion of the request enclosed in brackets, and declined to give the residue; and the plaintiff excepted.

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The exceptions taken at the second hearing* must also be overruled. As the findings that the transfer was voluntarily made and not induced by fraud or imposition stand, the court had to deal with an ordinary voluntary transfer by a husband to his wife, tainted with no fraud or imposition upon him, and where no declaration of trust or other written instrument appeared to control the written deeds, which placed the absolute title in the defendant.

The first three rulings requested were immaterial. The present rights of the parties in the land do not at all depend upon whether it was purchased with the product of their joint labor, whether before the transfer the defendant had any legal or equitable interest in the land, or whether the product of their joint

* The plaintiff requested the judge to rule:

"1. That the finding of the jury that 'the estate was purchased with the product of the joint labors of the parties' should now be disregarded and not considered by the court, because of misdirection by the court in the rulings given and refused, as set forth in the complainant's bill of exceptions, and because said finding is erroneous as matter of law.

"2. That before and at the time of said transfer of said estate to the respondent she had not any legal or equitable right or interest in said estate, and she cannot now set up and maintain any such right or interest in said estate.

"3. That the product of the 'joint labors' of the husband and wife could not, and cannot, be separated, divided, and set apart or applied in shares; that the product of all such labors belonged to the husband; that this is also true in respect of her separate or several labor performed for the husband or for his benefit.

"4. That upon the allegations of the bill, and of the answer, and the findings of the jury, the complainant has an equitable interest in and right to said estate, and is now entitled to a reconveyance thereof by the respondent.

"5. That upon the facts as disclosed by the bill and answer, the findings of the jury, and all of the competent evidence in this case, a trust in favor of the complainant was created by the deeds of transfer to the respondent, or a constructive trust should and must be found, held, and declared in his favor.

"6. That the respondent received and took this estate only to administer it, and this in the interest of the complainant, and to hold and preserve this estate for his benefit and that of his family.

"7. That the complainant is now entitled to a reconveyance of said estate by the respondent to the complainant, or to a just and equitable part and parcel thereof as this court shall determine, and to such decree or order of this court as shall secure to him his full and just rights in said estate."

The judge declined to rule as requested; and the plaintiff excepted.

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labor could be divided or all belonged to the husband, or whether that would be true of the product of the wife's several labor performed for the husband or for his benefit.

The other rulings requested are upon the theory that the plaintiff has an equitable interest in the estate, and is entitled to a reconveyance, or that a trust which should be declared was created in his favor by the deeds. But such a voluntary conveyance as the present without consideration, even with an oral agreement that a grantee shall hold land in trust, cannot create a trust which can be enforced. *Bartlett* v. *Bartlett*, 14 Gray, 277. *Titcomb* v. *Morrill*, 10 Allen, 15. *Molony* v. *Rourke*, 100 Mass. 190. *Campbell* v. *Brown*, 129 Mass. 23. *Moran* v. *Somes*, 154 Mass. 200, 202. As there was here a voluntary conveyance, untainted with fraud and unaffected by any written declaration of trust, it is immaterial what may have induced the plaintiff to make or the defendant to receive the transfer. Although he made it to preserve and protect his home, and she accepted it to assist him, and joined in carrying his desire into execution, and holds the land as the home for herself and her family, her rights are defined by her deed, and he is entitled to no relief in equity.

Exceptions overruled.

NATHANIEL M. SAFFORD *vs.* OLD COLONY RAILROAD COMPANY.

Norfolk. March 19, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Report of Master — Right of Way by Substitution — Motion to Recommit — Exceptions — Prescription — Practice.

If a master's report shows that the evidence was reported to the court at the plaintiff's request, in accordance with the rule which authorized the master "to find the facts and report the evidence so far as requested by either party," a motion by the plaintiff to recommit the report, with instructions to the master to report only the evidence upon which he based his findings, and such other evidence taken before him as either party might request, is properly overruled.

Where, on a bill in equity to compel a railroad company to open and perpetually maintain a private way at grade across its tracks, it appears that the plaintiff

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has no title to the way by deed or grant and has not used it long enough to acquire a right in it by prescription, the way in another place which he had by prescription having been taken by the defendant and paid for in accordance with the verdict of a jury in an action at law, a decree overruling the exceptions of the plaintiff to the master's report, confirming the report, and dismissing the bill, will not be disturbed; and the finding of the master, that in fact and in law no right to the way claimed in the suit of equity was in issue in the former action or submitted to the jury for consideration, is correct, if no such issue was raised by the pleadings, the suggestion of the plaintiff's counsel that the jury might find that a substituted right of way had been acquired having been objected to by the defendant's counsel and not adopted by the court, and the report of the proceedings at the former trial shows plainly that the plaintiff gained, and the defendant lost, no rights by anything that occurred there in regard to the alleged way in question in the suit in equity.

BILL IN EQUITY, to compel the defendant railroad company to open and perpetually maintain a private way at grade across its track in Milton. The bill alleged that the way was appurtenant to certain premises of the plaintiff described in the bill. The answer denied that the plaintiff owned the way claimed in the bill, and that the defendant had obstructed any right of way belonging to the plaintiff; and also alleged that any right of way appurtenant to the plaintiff's land described in the bill was taken by a location upon and taking for railroad purposes of the land over which the right of way existed, and that specific damages were paid for the interruption of the way caused by such taking.

The case having been referred to a master, "to find the facts and report the evidence so far as requested by either party," he found and reported as follows:

"1. On and before July 9, 1887, the plaintiff's father, Nathaniel F. Safford, possessed a piece of real estate in Milton, containing over fifteen thousand square feet, some ninety odd feet of the westerly side of which abutted on Adams Street, and about thirty feet of the same side abutted on land occupied by the defendant for the old railroad station, which station made a jog in said land; and the northerly side of said land abutted on the defendant's railroad tracks and location. The front part of this lot of land was occupied by a dwelling-house, known as the Suffolk Resolves House, which house was on the line of Adams Street, and next southerly to the defendant's old railroad station; the rear part of said land, which was considerably lower in grade than the front part, was occupied by stables let to other tenants than those occupying the house.

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"2. The plaintiff's father had a right of way by prescription, for teams and foot passengers, in a different locus than that now in dispute, appurtenant to said estate. This way was nearly twenty feet wide, and ran from the northerly side of the land, near the stables, in a northerly direction, and crossed the defendant's railroad tracks nearly eighty feet easterly of Adams Street, and a little over twenty feet easterly of the old railroad station, which station made a jog in the land, as before stated.

"3. In 1887 the defendant enlarged and extended its terminal facilities, and constructed a new railroad station. For this purpose, on July 9, 1887, it took by due proceedings at law a portion of the land belonging to the plaintiff's father, containing fifteen hundred and forty square feet, adjoining and directly easterly of the old railroad station. On this land thus taken they constructed a new railroad station, which wholly occupied that part of said land which had been the starting point of the prescriptive way, and wholly blocked up that portion of the defendant's land over which the way had passed.

"4. The defendant in 1887, and after July 9 of that year, laid a stone or concrete platform in front of the new station, and parallel with its tracks, which platform extended over and across the locus of the prescriptive way, and continued beyond that point some eighty feet easterly. At the easterly termination of the concrete platform a space of about twelve feet was left, and beyond that space easterly was another wooden platform. Planking was laid down by the defendant between and each side of its tracks opposite and northerly of the space between the concrete and wooden platforms, and, after the prescriptive way had been interrupted, the plaintiff's father and his tenants, and afterwards the plaintiff and his tenants, made the same use, without objection by the defendant until June 24, 1892, of the land and planking opposite said space, and of the land between the two platforms that previously had been made of the prescriptive way. This new use of what may be called for identification a substituted way commenced immediately after the prescriptive way had been interrupted by the construction of the new station, which was in the autumn of 1887; and this substituted way is the right of way alleged in the present suit. The defendant on June 24, 1892, obstructed and stopped the substituted way by a

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fence along the northerly line of its location. The rear portion of the plaintiff's premises, upon which the stables stand, is of so much lower grade than Adams Street, that the most convenient and economical means of access to such portion is by a way across the defendant's railroad, and the stables were moved and relocated by the plaintiff's father so as to be reached by the substituted way at the time its use commenced.

"5. The plaintiff's father, being aggrieved at the damages awarded him by the county commissioners for the taking of said land, duly filed a petition, which was entered in July, 1890, in the Superior Court, asking that his damages might be assessed by a jury. Pending that petition, and before a hearing thereon, the plaintiff's father, in April, 1891, died intestate, leaving a widow, Josephine E. M. Safford, who was appointed administratrix of his goods and estate, and was admitted to prosecute the petition. The plaintiff was sole heir at law, and said land with its appurtenances descended to him in fee, subject to the widow's legal rights.

"6. The said petition for damages was tried in May, 1892, and the jury rendered a verdict for the petitioner for the sum of $746.61, upon which verdict judgment was entered on June 17, 1892, and said judgment was satisfied on June 20, 1892. The presiding justice at the trial of said petition submitted to the jury the three following questions.

"First. 'Was there a right of way appurtenant to the petitioner's land across the land of the respondent at the time of the taking of a portion of the petitioner's land by the respondent?'

"Secondly. 'If so, state the amount of damages sustained by the petitioner by reason of the interruption to said way or inconvenience caused in its use by the taking by the respondent.'

"Thirdly. 'State also where said right of way was, if one existed.'

"The jury answered the first question, 'Yes'; the second question, 'One hundred fifteen dollars and fifty one-hundredths (this is included in the verdict)'; and the third question, 'As per plan of Whitman and Breck, dated March 22, 1871.'

"The way laid down on the said plan of Whitman and Breck, which plan was in evidence, is the way described in paragraph two of this report, and called herein a prescriptive way. During

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the trial of said petition, the jury viewed the premises, saw the location of the old prescriptive way, and the location of the substituted way, and had their attention called by the petitioner's counsel to the fact that the use of the substituted way had taken the place of the prescriptive way. The admissibility in this case of the record and proceedings in said petition for damages was objected to by the defendant, and was admitted subject to its objection.

"7. The plaintiff claimed upon all the evidence the right of way alleged in this suit, being that described in paragraph 4 of this report and called a substituted way, and that it had been substituted for and grafted upon the former prescriptive way, and that the plaintiff's right to this new or substituted way had been in issue, and had been established and determined in the aforesaid petition for damages, and that the jury in that case assessed damages only for the difference in value of the use of the prescriptive way and the substituted way. I find that the plaintiff had no right to the substituted way, and that the use thereof, as hereinbefore stated, was by the implied revocable license of the defendant.

"8. Upon inspection and perusal of the record and evidence in the said petition for damages, I find:

"First. That the plaintiff was not a party to that suit, and his alleged rights in the substituted way could not have been in issue therein.

"Secondly. That said petition was for the assessment of damages sustained by the estate of Nathaniel F. Safford, on the ninth day of July, 1887, which date was anterior to any use of the substituted way.

"Thirdly. That in fact and in law no right to the alleged substituted way was in issue in said petition, or submitted to the jury for consideration.

"9. I find and report that the plaintiff is not entitled to the right of way alleged in his bill.

"10. At the plaintiff's request, I report and return to court herewith all the evidence taken before me, including three plans."

The plaintiff took sundry exceptions to the finding of the master on the evidence, and moved to recommit the report, with instructions to report only the evidence upon which he based his findings, and such other evidence, taken before him,

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as either party might request. The court overruled the motion, and the plaintiff appealed. The court entered a decree that "the plaintiff's exceptions to the master's report be overruled, the master's report confirmed, and the bill dismissed with costs"; and the plaintiff appealed.

H. E. Ware, (*Z. S. Arnold* with him,) for the plaintiff.

J. H. Benton, Jr., for the defendant.

KNOWLTON, J. The plaintiff introduced at the hearing before the master the record of a judgment, and of the proceedings at the trial in a court of law in favor of the administrator of the estate of his father, from whom his title came by inheritance, against the defendant, to show that the matter now in issue was *res judicata*, or that the defendant was estopped from setting up a defence in the present suit. He then took sundry exceptions to the finding of the master on this evidence. The master annexed to his report a copy of this evidence, and of all the other evidence in the case, and the plaintiff moved to recommit the report, with instructions to report only the evidence upon which he based his findings, and such other evidence taken before him as either party might request. The court overruled the motion, and the plaintiff appealed. The order overruling the motion was correct. The report shows that the evidence was reported to the court at the plaintiff's request, in accordance with the rule under which the master was acting. If the parties agreed to submit the case to the court upon a part of the evidence taken before the master, they could do so without an order of recommittal, and in the absence of such an agreement neither party could properly be compelled under this rule to submit to a hearing upon only a part of the evidence.

The plaintiff also appealed from the decree overruling his exceptions, confirming the report, and dismissing the bill. This decree was plainly right. The plaintiff has no title to a way by deed or grant. He has not used the way in question long enough to acquire a right in it by prescription. The way in another place which he had by prescription was taken by the defendant, and paid for in accordance with the verdict of the jury in the action at law above referred to.

The findings of the master that in fact and in law no right to the way now claimed was in issue in the former action, or submitted

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to the jury for consideration, was correct. No such issue was raised by the pleadings, and the suggestion of the plaintiff's counsel that the jury might find that a substituted right of way had been acquired, was expressly objected to by the defendant's counsel, and not adopted by the court.* The stenographic report of the proceedings at the former trial shows plainly that the plaintiff gained, and the defendant lost, no right by anything that occurred there in regard to the alleged way now in question.

Decree affirmed.

BOSTON MARINE INSURANCE COMPANY *vs.* JOSEPH O. PROCTOR, JR., & others.

Suffolk. March 19, 22, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Equity — Creditors' Bill — Purchaser for Value without Notice.

A., the owner of a vessel, conveyed the same by a recorded bill of sale to B. as security for a debt, and B. subsequently conveyed it to C. on payment by him of A.'s debt. C. also paid the vessel's bills, and the two sums together amounted nearly to what the vessel would have brought on a forced sale. The vessel, which was insured, was subsequently lost, and D., to whom A. was indebted, brought a bill in equity under Pub. Sts. c. 151, § 2, cl. 11, against A., C., and the company by which the vessel was insured, to reach and apply the insurance money in payment of his debt. *Held*, that, as C. was a *bona fide* purchaser for value, and as it did not appear that A. had any interest in the policy, the bill was properly dismissed.

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* When the counsel for the railroad company requested, in the trial of the petition for damages, that, if the jury found there was a prescriptive way, they should find where it was, it was conceded that it was as laid down on Breck's plan, and the counsel for the railroad then said, "If it was there, it was not anywhere else," to which counsel for the administratrix said, "Then it went by substitution, by the acquiescence of the railroad, in the other place." To which the reply was made, "Not at all. You cannot get it in two places. If you had it, we are willing to pay any damage to it, but we want that to be the end of it." The petitioner's counsel then asked the court, if the jury found there was a right of way, that they should also find that the petitioner had a substituted right of way. This the judge declined to have done, saying that he did not understand there was any substituted right of way, and that the question of such substituted way was not in issue.

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BILL IN EQUITY, filed January 11, 1895, against Joseph O. Proctor, Jr., William T. Cunningham, and the China Mutual and the British and Foreign Marine Insurance Companies, to reach and apply, under Pub. Sts. c. 151, § 2, cl. 11, the proceeds of insurance on the schooner Addie Winthrop, in payment of a debt of Proctor to the plaintiff.

The bill alleged that between November 1, 1891, and March 1, 1892, the defendant Proctor became indebted to the plaintiff for premiums of insurance on certain vessels, and their cargoes and freight, and that he had never paid the same; that he had no property which could be come at to be attached at law; that he had conveyed to the defendant Cunningham the schooner Addie Winthrop, her cargoes and freight, for the purpose of concealing the same from his creditors, so that the same could not be attached at law; that the schooner, in which the defendant Proctor still retained an equitable interest, had become a total loss, and that the China Mutual and the British Foreign Marine Insurance Companies had issued to Proctor and Cunningham, or both of them, and in their behalf, policies of insurance on said schooner, her cargo and freight, the proceeds of which, by reason of the loss of such schooner, would become due and payable to them.

The prayer of the bill was that the defendant Proctor should be directed to pay to the plaintiff the sum due from him to it; that Cunningham should be ordered to pay to the plaintiff any money or effects of the defendant Proctor coming into his hands; that the China Mutual and the British and Foreign Marine Insurance Companies should be ordered to pay over to the plaintiff all money which should be due from them to Proctor or Cunningham on account of the schooner Addie Winthrop; that Cunningham and the two defendant insurance companies should be enjoined from paying over any money to the defendant Proctor; and for general relief.

The case was heard in the Superior Court, before *Fessenden*, J., who dismissed the bill, on the ground that Cunningham purchased the schooner Addie Winthrop in good faith and for a valuable consideration, and reported the case for the determination of this court. The material facts appear in the opinion.

E. P. Carver, for the plaintiff.

G. Cunningham, for the defendants.

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HOLMES, J. This is a bill in equity to reach and apply the proceeds of insurance upon a vessel in the hands of the defendant Cunningham, on the ground that the vessel was transferred to Cunningham by the defendant Proctor in fraud of Proctor's creditors. The judge before whom the case was tried dismissed the bill, on the ground that Cunningham was a *bona fide* purchaser for value. The case is here on report, and the plaintiff contends that, notwithstanding the well known presumptions in favor of the finding, the decree manifestly should have been the other way. We are of opinion that this cannot be said as matter of law.

The stress of the plaintiff's argument is, that Proctor did not receive anything for his transfer, which is true enough, but does not at all affect the fact that Cunningham paid a valuable, and, at least possibly, a perfectly adequate consideration. Proctor had conveyed the vessel, by a recorded bill of sale absolute in form, to Potter and Wrightington, as security for a debt upon which there remained due $2,401.30. The transfer to Cunningham was in consideration of his paying this sum. He also paid the vessel's bills, amounting to $372.60. The vessel would have brought from twenty-six to twenty-nine hundred dollars on a forced sale, so that it is impossible for us to say that the price was not fair, and doubly impossible to say that the transaction was not honest.

The plaintiff bases a part of his argument on the state of the registration and the right of attaching creditors. The registered title of Cunningham comes through a series of bills of sale absolute in form, but it is said that the first one, from Proctor to Potter and Wrightington, was a mortgage, and all the rest are only transfers of a mortgage. This is a mistake. Proctor delivered the vessel and renounced his equitable rights to Cunningham after the conveyance to him. There is no doubt, of course, that this passed his title as between the parties, (Rev. Sts. U. S. § 4192,) and there was no need, in order to give Cunningham a title good as against attaching creditors, that Proctor should execute a bill of sale to him for registration. Proctor's equity while it lasted did not affect the character of his bill of sale as an instrument. See *Carpenter* v. *Snelling*, 97 Mass. 452, 457. It was a collateral though paramount matter. When it was renounced,

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the bill of sale was as good a foundation for a title as if there never had been an equity of redemption. We quite agree with the statement of the defendants' counsel that purchasers or attaching creditors cannot be allowed to treat an unrecorded equity as valid, and an unrecorded waiver or conveyance of it as invalid. But a shorter answer to the whole matter is that the plaintiff by his bill puts his case on the ground of a conveyance in fraud of creditors, and nothing else, and as he has seen fit to make that charge he must maintain it or fall.

A further and short answer to the plaintiff's case is, that it does not appear that the insurance was taken out in any part for the benefit of Proctor, and this being so, he would have had no interest in the proceeds, even if he had been interested in the vessel. *Harrison* v. *Pepper*, 166 Mass. 288.

The bill made some averments touching cargo, but that part of the case is not argued, and seems to have no foundation.

Bill dismissed.

EDWARD REYNOLDS *vs.* MERCHANTS' WOOLEN COMPANY.

Suffolk. March 23, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Negligence — Instructions — Liability of Employer for Bursting of Machine purchased of Reputable Maker.

In an action for personal injuries occasioned to the plaintiff by the flying apart of the cylinder of a dusting machine in use in the mill where he was employed, he has no ground of exception to an instruction to the jury that the procuring of machinery by mill-owners of a reputable maker meets the standard of ordinary care, and that it is not negligence on the part of an employer to place in his mill, and, after proper inspection, to use, machinery so bought.

TORT, for personal injuries occasioned to the plaintiff by the flying apart of the cylinder of a dusting machine in use in the mill where he was employed. The declaration contained two counts, one at common law, and the other under the employers' liability act, St. 1887, c. 270.

At the trial in the Superior Court, before *Blodgett*, J., the jury

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returned a verdict for the defendant; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

E. B. Callender, for the plaintiff, submitted the case on a brief.

J. Lowell, Jr., for the defendant.

BARKER, J. It is conceded that the plaintiff was in the exercise of due care. The machine had been recently purchased of a reputable manufacturer of machinery. It had no iron bands around its cylinder, and such bands would have tended to keep it from bursting, and were in use on other dusting machines in the mill. There was also evidence tending to show that the cause of the accident was the existence of blow holes in the iron arms which formed part of the cylinder, and that no inspection could have detected the presence of the blow holes.

The only exception argued upon the plaintiff's brief was one taken at the conclusion of the charge, and was then stated by counsel to be "to the part of the charge which related to the statement by the court that of itself the fact of any accident after the machine was set to work was not of itself evidence of negligence." The bill of exceptions shows that no statement was made by the court that the fact of the accident was not of itself evidence of negligence. We suppose, therefore, that the exception was intended to be directed to that part of the charge in which the court, after stating that the fact that the machine broke down was competent evidence to show that it was in a defective condition, so that it could not safely be used for the purposes for which it was brought into the mill, continued in these words: "But it does not of itself show that the plaintiff can maintain this action against this corporation. There must have been the injury, of course, or the action cannot be maintained, but you are not, as matter of law, justified in finding, because this machine put into this mill, it is now conceded, within a comparatively short time, two or three weeks, broke down when it was being used in the way it was intended it should be used, of itself shows such a condition of things as to subject this corporation to liability in damages. And you will see why that is so when you come to consider what the rule of law is upon which the plaintiff relies in support of this action, and within which he must bring himself." Then, after stating

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that the plaintiff as an employee assumed certain risks, and that the law imposed upon the defendant as his employer certain duties, the only one of which the jury needed to consider "was the duty of using reasonable care to provide suitable machinery with which and upon which the plaintiff, if himself careful, might work in safety," and that to maintain the action the plaintiff must show that there was a failure on the part of the defendant in the performance of the duty to use reasonable care to provide suitable machinery, and must show that it did not use reasonable care to provide this particular machine, the charge continued: "It cannot be said, as matter of law, that this corporation would be responsible for the failure to use proper care on the part of the manufacturer of the machine. It is not true that this corporation was required to manufacture all the . . . different kinds of machinery used in an establishment of this sort. It may go into the market and buy its machinery, and if a machine is bought of a reputable maker, in other words, if reasonable care is used in selecting the maker, and then reasonable care is used upon the delivery of a machine, in inspecting it, in setting it up, in putting it in operation, it cannot be said that the defendant, or an employer, would be liable in such a case, although it might clearly appear later on, that the maker of that machine was careless, and put in improper materials, or did imperfect and improper work. The law does not make the employer an insurer of the safety of his machines, nor a guarantor that due care shall be used by the manufacturer. It does require, however, that he shall use reasonable care to provide proper machinery."

This statement was clear, correct in law, and adapted to the situation of the case. Machinery used in textile manufacturing is ordinarily built and furnished by persons whose business it is to make machinery, and who, if reputable makers, are more likely to turn out safe products than men whose chief skill and thought are developed in some other line of work. Mill-owners usually procure their machines of reputable makers. Such conduct meets the standard of ordinary care, and it is not negligence on the part of an employer to place in his mill, and, after proper inspection, to use machinery so bought. *Shea* v. *Wellington*, 163 Mass. 364. *Losee* v. *Buchanan*, 51 N. Y. 476, 493. *Carlson* v.

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Phœnix Bridge Co. 132 N. Y. 273. *Ballard* v. *Hitchcock Manuf. Co.* 51 Hun, 188. *Grand Rapids & Indiana Railroad* v. *Huntley*, 38 Mich. 537, 546. *Morton* v. *Detroit, Bay City, & Alpena Railroad*, 81 Mich. 423, 433. *Ardesco Oil Co.* v. *Gilson*, 63 Penn. St. 146. *Mansfield Coal & Coke Co.* v. *McEnery*, 91 Penn. St. 185. See also *Ingalls* v. *Bills*, 9 Met. 1; *Littlejohn* v. *Fitchburg Railroad*, 148 Mass. 478, 481; *Richardson* v. *Great Eastern Railway*, 1 C. P. D. 342; *Readhead* v. *Midland Railway*, L. R. 4 Q. B. 379; *Boswell* v. *Laird*, 8 Cal. 469.

The plaintiff especially relies upon *White* v. *Boston & Albany Railroad*, 144 Mass. 404, and *Moynihan* v. *Hills Co.* 146 Mass. 586. The first of these cases was an action against a common carrier of passengers, where the defendant was under a different obligation from that of an employer. In the second, the machine, although bought originally of a manufacturer, had been reconstructed by the defendant itself; and the statement that the fact that the defendant was using it in its business when it broke, if left unexplained, was some evidence of negligence, must be taken with the fact that the machine as used had been reconstructed by the defendant. In the present case, the recent purchase of the machine of a reputable maker was itself an explanation which the jury might find sufficient to show that the defendant was not negligent in putting it in use, and which justified the ruling that the accident did not of itself show that the plaintiff could maintain the action. See *Duffy* v. *Upton*, 113 Mass. 544, 548; *Le Barron* v. *East Boston Ferry Co.* 11 Allen, 312, 316; *Losee* v. *Buchanan*, 51 N. Y. 476; *Dobbins* v. *Brown*, 119 N. Y. 188; *Cosulich* v. *Standard Oil Co.* 122 N. Y. 118; *Reiss* v. *New York Steam Co.* 128 N. Y. 103.

The happening of the accident was consistent with due care on the part of the defendant, and the jury were therefore properly instructed that it did not of itself show that the plaintiff could maintain the action.

Exceptions overruled.

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HANNAH RAMSDELL, administratrix, *vs.* EBEN D. JORDAN & others.

Suffolk. March 23, 24, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Negligence — Due Care.

If a person puts his head into an elevator well for the purpose of shouting up the shaft for the car to come down, and it does come down and strikes him, an action for the injuries occasioned thereby cannot be maintained.

TORT, for personal injuries occasioned to an employee of an expressman by being crushed by a freight elevator on the defendants' premises while he was delivering merchandise in the course of his employer's business. The plaintiff having died after the action was begun, his administratrix was allowed, on motion, to prosecute it.

At the trial in the Superior Court, before *Blodgett*, J., there was evidence tending to show that there was an opening into the elevator well from the sidewalk, which opening was guarded by a gate three or four feet high, extending across it; that the elevator was not equipped with any appliances for giving warning of its approach to the landing; that the press-button for calling the elevator had been out of order for a month at least; and that the intestate had been to the elevator to deliver goods not more than once a week for a period of two months before the accident.

The only witness who saw the accident testified that neither of two men in the employ of the defendants, whose duty it was to receive the goods, was on the sidewalk; that the intestate came up to the gate, leaned his head over it, so that it came about a foot into the well, with his neck and face turned up towards the top of the elevator well and called out, "Elevator"; that he made a motion as if to withdraw, but the elevator struck him on the head before he had time so to do; and that the position in which he stood as he called the elevator was similar to that which he had seen the two men in the defendants' employ

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assume frequently when they called the elevator, and similar to that assumed by all the other teamsters who called the elevator, and the same as he himself had assumed many times.

At the close of the evidence for the plaintiff, the judge, at the defendants' request, directed a verdict for the defendants; and the plaintiff alleged exceptions.

S. L. Whipple, for the plaintiff.

J. Lowell, Jr., for the defendants.

BARKER, J. It is so plainly dangerous for a person to put his head into an elevator well for the purpose of shouting up the shaft for the car to come down, that the verdict for the defendants was rightly ordered. *Murphy* v. *Webster*, 151 Mass. 121. *Rood* v. *Lawrence Manuf. Co.* 155 Mass. 590. *Degnan* v. *Jordan*, 164 Mass. 84. See also *Taylor* v. *Carew Manuf. Co.* 143 Mass. 470; *Ballou* v. *Collamore*, 160 Mass. 246.

The exception to the exclusion of evidence was not argued, and we treat it as waived. *Exceptions overruled.*

HARRY A. BROWN, trustee, *vs.* GEORGE P. WRIGHT & others.

Middlesex. March 23, 24, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trust and Trustee — Accumulation of Surplus Income — Interest.

On a bill in equity for instructions, brought after the death of the testator's widow, as to the duties of the trustee, to whom was bequeathed twenty thousand dollars which was to furnish income and interest to be paid to the testator's surviving son for life after the widow's death, as well as nearly all the rest of the testator's property, the court said that the trustee was to pay over the full income of twenty thousand dollars, which was less than half of the trust estate, for life, that the surplus of income was to be accumulated, and that the ultimate disposal of the fund would not now be determined.

Giving property in trust to carefully manage and invest it necessarily implies that any income is part of the trust fund, and if such income is in excess of the sums which the trustee is directed to pay out before the final termination of the trust, such excess of income must necessarily be held in the trust and accumulate until it can be paid out in accordance with the directions of the testator; and it cannot be said, therefore, that any part of the income is undevised property.

The frequent use of the phrase "interest and income" in a will and codicil does

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not indicate an intention to direct the payment of interest at the rate of six per cent a year, whether earned or not, on the trust fund in question, and any additional income which the fund may yield.

BILL IN EQUITY, by the trustee under the will of Nathan M. Wright, to obtain the instructions of the court as to the construction thereof. Hearing before *Barker*, J., who, at the request of the parties, reserved the case for the consideration of the full court. The facts appear in the opinion.

W. Schofield, for George P. Wright.

G. F. Richardson & G. R. Richardson, (*D. M. Richardson* with them,) for Anna E. Fay.

J. C. Burke & W. S. Marshall, (*J. F. Corbett* with them,) for Fred R. Wright.

H. Dunham, for James H. Wright and others.

B. F. Hayes, for the unascertained heirs of Nathan M. Wright.

C. E. Hellier, for the unborn issue of George P. Wright.

BARKER, J. The will was made on April 15, 1885, when the testator's family consisted of his second wife and two unmarried sons, the elder of whom was his son by a first wife. This son died on November 4, 1888, unmarried and without issue. The codicil was made on April 26, 1889. The testator died on March 31, 1890, and the will and codicil were allowed on May 20, 1890. His widow, the wife mentioned in the will and codicil, died on May 7, 1896. The younger son is yet living, and is yet unmarried and without issue, and is the testator's only heir at law. At the time of the making of the will and codicil, and of the testator's death, his other blood relatives were a brother, since deceased, and the issue of two deceased brothers. The living brother had only an adopted daughter, who had issue. The testator had a mother in law, who died between the dates of the will and codicil, and three sisters in law, one the sister of his wife, and the others the widows of his deceased brothers.

Construing together the will and codicil the disposition made of the estate is this. The executors are directed to pay debts and charges, and to see that the burial lot is put in order and the graves marked.

The household furniture and indoor movables and chattels, horses and vehicles, and tools, are given to the wife, with the use of a certain real estate for life, or of the proceeds, if sold by the

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trustee, and the interest and income for life of fifteen thousand dollars, with the right to any part or all of the principal, at her discretion.

Specific money legacies of one hundred dollars each, payable within one year after the testator's death, are given to the sisters in law. To the younger son his promissory note held by the testator, one hundred dollars per annum during the life of the testator's wife, and after her decease the interest and income of twenty thousand dollars during his natural life. The business, stock, book accounts, and chattels of the testator's store, the sum of one thousand dollars in cash, a gold watch and chain, and the interest and income of the residue of the testator's estate after the death of his wife and the payment of the legacies to be paid upon her death, are given to the trustee to be held, managed, and disposed of in trust; as are also all the rest, residue, and remainder of the testator's property.

Legacies to certain relatives are given to be paid to the "legatees respectively, within one year if they be living at the date of my wife's decease." These legacies are not in terms directed to be paid by the trustee.

Among the directions to the trustee are to take, carefully manage, and invest all of the testator's estate bequeathed to him to hold in trust, to pay over to the testator's wife quarterly or semiannually, as may be convenient, the interest and income thereof for and during her natural life; after her death to pay certain money legacies to charities and relatives; after the death of the wife "to take and pay over to" the surviving son the interest and income of twenty thousand dollars for and during his natural life; if the son should die, leaving a widow and children, to pay the income and interest of the twenty thousand dollars to the "widow and children in equal parts during her life, with remainder over, in fee simple, to his children, both principal and interest"; but if the son "should die leaving no issue, but leaving a widow, then to pay the said interest and income to her during her natural life," and after the termination of all the life estates and the payment of all the legacies to pay over and distribute all that shall then remain to the issue of the testator's son, or, failing such issue, to the testator's right heirs at law.

There now remains in the hands of the trustee property to the

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amount of about fifty thousand dollars, after the death of the testator's widow, and the payment of the legacies given by the will and codicil, to be paid before or upon her death.

The surviving son contends that the trust should now be terminated, and the whole estate be transferred and paid over to him. He contends further, that, if the whole estate is not now payable to him, he is entitled to the whole income; and that if the whole income is not payable to him, the trustee should set apart a fund of twenty thousand dollars, and should pay to him interest at the rate of six per cent a year on that sum, and any income above such interest as may accrue from the fund so set apart.

Other respondents contend that the surviving son is now entitled only to the income of a fund of twenty thousand dollars, to be set apart by the trustee; that any other income from the estate is to be accumulated until the death of the surviving son, and that, if he shall die without leaving issue, the whole estate is to be then distributed to those who shall then be the testator's heirs at law. The contingent provision for a possible widow of the surviving son it is contended is void.

The testator has bequeathed and devised to the trustee all the property which was to furnish the income and interest to be paid to his surviving son for life after the death of the testator's wife, as well as all the rest of the testator's property not specifically devised, or needed for the settlement of debts and charges, and the small legacies payable within a year from the testator's death. The trustee is directed in terms to take the same and to carefully manage and invest it, and to keep it invested. Owning the property in trust, he is to thus hold it and keep it invested until it shall be finally paid over and distributed in accordance with the directions given by the testator. This necessarily implies that any income is part of the trust fund, and if such income is in excess of the sums which the trustee is directed to pay out before the final termination of the trust, such excess of income must necessarily be held in the trust and accumulated until it can be paid out in accordance with the directions of the testator. Therefore it cannot be said that any part of the income is undevised property. So much of it as may not be needed to pay to the surviving son during his life the in-

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terest and income of twenty thousand dollars is to be held by the trustee and invested until the son's death, if not longer, and is ultimately to be paid out and distributed by the trustee.

The intention of the testator that the fund should be so held and any surplus income so accumulated, is shown by the provisions of the will, and is one which the law will carry out, because it is his will expressed in the manner authorized by law. We need not know whether he made this disposition from a distrust of the ability of his son to keep or to manage the principal of the estate, or from a desire to induce him to marry and have children, or from some other reason. It is enough that, as we construe his language, he has so directed, and we are to give his wishes effect. See *Claflin* v. *Claflin*, 149 Mass. 19; *Young* v. *Snow*, 167 Mass. 287; *Wynn* v. *Bartlett*, 167 Mass. 292.

This is as far as we consider it wise to go at present in instructing the trustee. If, as we do not at present decide, some of the directions as to the disposal of the fund after the death of the surviving son are too remote, that does not affect the present duty of the trustee, which is to hold the fund and to keep it invested and to pay to the surviving son the interest and income of twenty thousand dollars for and during his natural life, as the testator has directed.

In the frequent use of the phrase "interest and income" in the will and codicil, we see no intention to direct the payment of interest at the rate of six per cent a year, whether earned or not, upon the sum of twenty thousand dollars, and any additional income which the fund may yield. We think the intention was to give the product or yield of a fund of twenty thousand dollars, whether it should come from interest or any other source of income. It is fairly to be said that the product of that sum, carefully managed and invested, is to be paid as it accrues to the surviving son for and during his life. The testator does not direct that such a fund shall be set apart, or that the net income of a fund of that amount shall be so paid. If the trustee keeps the whole trust fund properly invested, and pays over the full income of twenty thousand dollars of it to the surviving son, for and during his life, we think he will do what the testator meant in that respect.

Decree to be framed accordingly.

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HORATIO W. SOUTHWORTH *vs.* FLORENCE C. TREADWELL.

Suffolk. March 26, 1897. — May 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Reduction of Alimony on Remarriage of Libellant.

Alimony, though granted by a decree of the court in pursuance of an agreement of the parties, is not a vested right beyond the power of the court to change, and the remarriage of the wife is *prima facie* cause for its reduction to a nominal sum.

PETITION for the reduction of alimony.

The petition alleged that on June 5, 1890, a divorce from the petitioner was granted to the respondent on the ground of desertion, with an allowance of one hundred and fifty dollars a month as alimony; that on January 23, 1896, the respondent was married to one Treadwell, with whom she thereafter lived, and that the payment of the alimony as required by the decree was a burden upon the petitioner. The prayer of the petition was that the order as to alimony should be revoked, or the alimony reduced.

The answer alleged that the decree as to alimony was based upon an agreement to the same effect between the parties, and that it was therefore a vested interest which could not be avoided by a subsequent decree; that the remarriage of the respondent had not materially changed her circumstances, and that the continued payment of alimony was necessary to her support; and denied that its payment was a burden to the petitioner.

The case was heard in the Superior Court, upon an agreed statement of facts, by *Lilley*, J., who granted the prayer of the petition, and reduced the alimony to one dollar a year, and afterwards, at the request of the parties, reported the case for the determination of this court, in substance as follows.

The petitioner and respondent were married on October 21, 1861, and the respondent obtained a divorce from the petitioner for desertion on June 5, 1890. Subsequently, the parties agreed in writing that alimony should be allowed to the respondent at the rate of $150 per month, and on June 21, 1890, this agreement

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was adopted as the order of the court, and ordered to be embodied in the decree absolute when such decree, if any, should be entered. On March 3, 1891, the divorce was made absolute. At the hearing on this petition, the respondent admitted her marriage to one Treadwell, who was present with her in court, but there was no other evidence.

The respondent requested the judge to rule that the alimony was a vested right which the court had no power to disturb, and that in order to maintain this petition the petitioner was bound to show that, by her remarriage, the respondent's financial condition was so changed that she did not need the alimony allowed to her.

The judge declined to rule as requested, and, at the request of the petitioner, ruled that the remarriage of the respondent was *prima facie* cause for the reduction of alimony to a nominal sum. The respondent alleged exceptions.

If the rulings and refusals to rule were right, the decree reducing the alimony was to be affirmed; otherwise, the case was to stand for further hearing.

R. H. Roy, (of New York,) for the respondent.

T. H. Gage, Jr., for the petitioner.

BARKER, J. The court was right in declining to rule as requested by the respondent, and in the ruling given at the request of the petitioner. The stipulation for alimony to be decreed in the suit for divorce added nothing to the force of the decree, and did not affect the power of the court to change the rights of the parties by further orders or decrees respecting alimony. Pub. Sts. c. 146, § 39. Upon the petition the court had power to revise and modify the decree, as it deemed reasonable upon all the circumstances of the case. *Graves* v. *Graves*, 108 Mass. 314, 321. *Foster* v. *Foster*, 130 Mass. 189, 191.

Whether the respondent's remarriage had in fact so changed her financial condition that she did not need the provision made for her by the original decree, was a matter upon which either party could offer evidence. It was not alleged as a ground of the petition that her financial situation had been so changed, and the answer alleged that it was not materially different. The omission of the petitioner to introduce evidence to disprove an allegation made by the answer did not deprive him of the

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right to ask for a revision of the former decree upon such facts as appeared at the hearing. The remarriage was admitted, and although the respondent and her husband were in court, she introduced no evidence. The remarriage was a material change in the circumstances of the respondent, giving her the right to be supported by another man. In the absence of proof that this right was not adequate to all her needs, the court might well deem it sufficient cause for revising the former decree, and for reducing the alimony to a nominal sum, and was right in ruling that *prima facie* it was such cause. *Decree affirmed.*

WILLIAM GANLEY *vs.* THOMAS H. HALL.

Suffolk. November 17, 1896. — May 24, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Owner of Building — Licensee.

A person who goes to a tenement, not on any business in which his brother, the tenant, whom he goes to see, is engaged, but for the purpose of borrowing money, it not appearing that the brother ever held himself out as lending money or that he ever lent money, there being no previous appointment to call and no previous notice of his intention to call having been given, is a mere licensee, and cannot recover from the owner of the tenement for injuries received by falling on a formation of ice caused by the dripping of water from defective gutters and conductors on a flight of stairs used in common by the tenants.

TORT, for personal injuries occasioned to the plaintiff by falling on an artificial formation of ice caused by the dripping of water from defective gutters and conductors on a flight of stairs used in common by the tenants of the defendant. Trial in the Superior Court, before *Hammond*, J., who ruled that the plaintiff was a mere licensee, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. F. Cronan, for the plaintiff.

C. C. Smith, for the defendant.

LATHROP, J. In this case the plaintiff went to the tenement owned by the defendant purely on his own business, and not on

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any business in which his brother, the tenant whom he went to see, was engaged. He wished to borrow money, but the exceptions state that it did not appear that the plaintiff's brother ever held himself out as lending money, or that he ever lent money before. There was no previous appointment to call, and no previous notice of his intention to call had been given. The judge, therefore, rightly ruled that the plaintiff was a mere licensee, and that the defendant on the evidence was not liable. See *Plummer* v. *Dill*, 156 Mass. 426; *Hart* v. *Cole*, 156 Mass. 475.

The case at bar differs from *Wilcox* v. *Zane*, 167 Mass. 302, where the plaintiff was an agent or servant of one of the tenants, and was held to have the same rights as the tenant had.

Exceptions overruled.

FREDERIC B. HOLDER *vs.* HYMAN M. HILLSON.

Suffolk. March 4, 1897. — May 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Insolvency — Appeal to Superior Court — Declaration — Issues — Amendment — Statute.

The provisions of Pub. Sts. c. 157, § 87, that upon entering an appeal from a decision of a judge of the Court of Insolvency disallowing a claim to the Superior Court, "the creditor shall file in court a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law," do not give him the right to file a declaration for a new cause of action, nor does he have under the other words of the section, "and like proceedings shall be thereupon had in the pleadings, trial, and determination of the cause as in an action at law commenced and prosecuted in the usual manner," any right to an amendment changing the cause of action which has been so brought up by appeal; and, while the cause remains in the Superior Court, it is competent for the justice before whom the case comes on for hearing to refuse to try the case on issues which have been, as matter of law apparent on the face of the record, erroneously allowed by another justice, without first changing the order allowing the amendment.

APPEAL from a decision of the judge of insolvency, disallowing the claim of the plaintiff against the insolvent estate of the defendant. Trial in the Superior Court, before *Mason*, C. J., to whose ruling, the nature of which appears in the opinion, the plaintiff alleged exceptions.

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G. C. Abbott, for the plaintiff, submitted the case on a brief.

J. H. Blanchard, (*A. S. Cohen* with him,) for the defendant.

LATHROP, J. The claim of the plaintiff amounted to $2,598.97, on an account annexed, for certain boxes of tin. This claim was sworn to, as provided by the Pub. Sts. c. 157, § 29. The claim was disallowed by the judge of the court, and an appeal was taken to the Superior Court, under § 36. The plaintiff filed in that court, under § 37, a statement in writing of his claim, in three counts. The first and second counts were for the conversion of goods to the amount of $2,598.97. The third count alleged that the defendant wrongfully obtained from the plaintiff goods, all of the value of $2,598.97, according to a schedule annexed. This schedule was the same as the account annexed filed in the Court of Insolvency. The plaintiff was afterwards allowed by a justice of the Superior Court to amend the statement of his claim, by substituting therefor a claim in five counts. Each of the first four counts declared on a promissory note. The fifth count was upon an account annexed. The defendant appealed from the allowance of the amendment.

When the case was heard before the Chief Justice of the Superior Court, he made the following rulings: "The claim which the appellant now seeks to prosecute in the first four counts has never been submitted to the Court of Insolvency. The Superior Court has no original jurisdiction of claims against an insolvent debtor's estate. The case will stand for trial on the fifth count only, or so much thereof as was presented to the Court of Insolvency." The case is now before us on exceptions to these rulings.

We are of opinion that the rulings were right. Section 37 provides: "Upon entering the appeal the creditor shall file in court a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law." This clearly does not give him the right to file a declaration for a new cause of action. Nor does he have under the other words of the section, "and like proceedings shall be thereupon had in the pleadings, trial, and determination of the cause as in an action at law commenced and prosecuted in the usual manner," any right to an amendment changing the cause of action which has been brought by appeal to the Superior Court.

The plaintiff, however, contends that, as the amendment had

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once been allowed, it was beyond the power of the Chief Justice to say that the cause of action had never been submitted to the Court of Insolvency; but, while the cause remained in the Superior Court, it was competent for the justice of that court before whom the case came on for hearing to refuse to try the case on issues which had been, as matter of law apparent on the face of the record, erroneously allowed by another justice, without first changing the order allowing the amendment.

The case of *Mann* v. *Brewer*, 7 Allen, 202, has no application. The question there presented was whether this court would, under Gen. Sts. c. 129, § 82, (Pub. Sts. c. 167, § 85,) revise a finding of fact made in the Superior Court that an amendment there allowed was for the same cause of action.

Exceptions overruled.

IZETTE M. ALGER *vs.* CITY OF BOSTON.
MARIAN A. KNIGHT & another *vs.* SAME.
IZETTE M. ALGER & another *vs.* SAME.
SAME *vs.* SAME.

Suffolk. March 5, 1897. — May 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Change of Grade in Highway — Statute — Costs.

A landowner, who has applied, under St. 1890, c. 428, and acts in amendment thereof, to the Superior Court for a jury to assess his damages sustained by a change of grade of a highway, and has obtained a verdict in his favor, is not entitled to costs.

FOUR PETITIONS to the Superior Court, under St. 1890, c. 428, and acts in amendment thereof, to recover damages to the petitioners' several estates by reason of the change of grade of West Fourth Street, in Boston. Trial in the Superior Court, before *Richardson*, J., who reported the cases for the determination of this court, in substance as follows.

After the jury in the Superior Court had returned verdicts in favor of all the petitioners, and judgment had been entered upon

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them, the petitioners applied to the clerk to have their costs taxed, claiming in addition to the ordinary costs a large sum of money for expenses in the preparation of plans and the employment of experts upon the value of real estate. The clerk declined to tax any costs; the petitioners applied to the judge, who affirmed the decision of the clerk, and the petitioners appealed to this court.

H. W. Chaplin, for the petitioners.

T. M. Babson, for the respondent.

LATHROP, J. The St. of 1890, c. 428, makes no provision as to costs. It is well settled that, in proceedings of the nature of these before us, the general rules of law applicable to costs do not apply, and that unless costs are given in the statute under which such proceedings are brought, or in some general statute especially applicable to such proceedings, no costs can be awarded. *Commonwealth* v. *Carpenter*, 8 Mass. 268. *Hampshire & Hampden Canal Co.* v. *Ashley*, 15 Pick. 496. *Williams* v. *Taunton*, 126 Mass. 287. *Gifford* v. *Dartmouth*, 129 Mass. 185.

Judgment accordingly.

JEREMIAH O'NEIL *vs.* GEORGE H. KEYES & another.

Suffolk. March 8, 1897. — May 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Personal Injuries — Assumption of Risk.

A workman, who has been employed in different capacities for several months by a contractor who has a track on which he runs cars by means of a locomotive engine, cannot maintain an action for injuries occasioned, while he was trying to block the wheels of the engine, by falling and catching his glove on a spike which projected two or three inches from one of the sleepers just inside the track, if it appears that he was familiar with the work he was called upon to do, that he knew the danger of slipping if he failed to block the wheel, and that he knew that the sleepers were second-hand sleepers and he had seen spikes in some of them while the sleepers were in piles; and it is immaterial that he did not know of the particular spike which caused the injury.

TORT, for personal injuries occasioned to the plaintiff while in the defendants' employ. Trial in the Superior Court, before *Maynard*, J., who, at the close of the evidence for the plaintiff,

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directed a verdict for the defendants; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

S. A. Fuller & C. H. Blood, for the plaintiff.

S. H. Tyng, for the defendants.

LATHROP, J. The plaintiff was in the employ of the defendants, who were contractors engaged in the filling of a street in Boston. They had a gravel bank in Allston, and had a track half a mile long, on which they ran cars by means of a locomotive engine. The road near the bank was on a very steep grade. When the engine reached the spot where the plaintiff was, the engineer cried out, "Block her if you want her to stay." The plaintiff took a piece of wood about three feet long, and put it behind the forward driving wheel, so that the engine would back on to the block and stop. For some reason, which does not clearly appear, the plaintiff did not succeed in stopping the engine, but the wheel so caught the wood which he was holding that he was thrown towards the head of the engine, and he fell with one hand across the rail, forward of the driving wheel. He had on a glove which caught on a spike which projected two or three inches from one of the sleepers. The spike was about two inches from the rail towards the centre of the track. Before he could extricate himself the wheel ran over his hand, the engineer having reversed his engine. The plaintiff testified that he could have got his hand away if the spike had not been there. The spike is the defect complained of.

The sleepers used were second-hand sleepers, taken from other railroads, and in some cases the spikes which were in the sleepers were not removed when brought to the defendants. The exceptions state that the rails and sleepers, though second hand, were suitable for the use to which they were put by the defendants.

The plaintiff had blocked the engine more or less before; and he testified that some one was expected to block the driving wheel every time the engine was on that grade; that he supposed that the thing that happened to him was one of the accidents of railroading, and there was nobody excepting himself who had anything to do with controlling the blocking; and that he understood perfectly the theory of blocking.

It further appeared in evidence, that the sagging of the track required the insertion occasionally of additional sleepers, which

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were thrust in under the rails. There was no evidence when the sleeper which had the spike in it at the time of the accident was put in, or whether the spike was in it when it was put in.

The plaintiff had been in the employ of the defendants for several months, working in different capacities. He was familiar with the work he was called upon to do. He knew the danger of slipping, if he failed to block the wheel. He knew that the sleepers were second-hand sleepers, and he had seen spikes in some of them while the sleepers were in piles. That he did not know of the particular spike which caused the injury is immaterial. He must be held to have assumed the risk. *Murphy* v. *American Rubber Co.* 159 Mass. 266. *Feely* v. *Pearson Cordage Co.* 161 Mass. 426. *Exceptions overruled.*

GEORGE W. STEWART *vs.* CHARLES H. THAYER.

Suffolk. March 9, 1897. — May 24, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Entire Contract — Lord's Day — Statute.

By the terms of a contract between A. and B., A. was to receive for the services of himself and band, during two months, $24 for a week of seven days for each man, for the leader double pay, and for the soloist, when there was one, $10. A. performed his part, playing with the band at a seaside resort of which B. was the proprietor. On Sundays the afternoon concerts began from half past two to half past three, and there were also concerts in the evening. *Held*, in an action by A. against B. to recover a balance due him, that the contract was an entire one, and that the defence that, as some of the work and labor contracted for was to be done on the Lord's day, it was forbidden by the Pub. Sts. c. 98, §§ 1, 2, was good, as by that statute no concert of any kind could be licensed on the Lord's day, except after sunset.

CONTRACT, brought originally against the Point of Pines Company, Franklin W. Lodge, and Charles H. Thayer, for services rendered in furnishing music at the request of the defendant Thayer. The plaintiff, having discontinued against the first two defendants, proceeded against Thayer, who set up a discharge in insolvency, to obtain a special judgment against him under the statute to enable the plaintiff to proceed against the sureties on a

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bond given to dissolve an attachment. Trial in the Superior Court, without a jury, before *Bond*, J., who declined to give any of the rulings asked by the defendant, and found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

G. A. O. Ernst, for the defendant.

R. W. Nason, for the plaintiff.

LATHROP, J. The plaintiff seeks to recover for a balance due him in pursuance of a contract made with the defendant in 1893, by the terms of which the plaintiff was to receive for the services of himself and band, during July and August of that year, $24 for a week of seven days for each man, for the leader double pay, and for the soloist, when there was one, $10. The plaintiff performed his part of the contract, playing with the band at a seaside resort of which the defendant was the proprietor. On Sundays, the afternoon concerts began from half past two to half past three, and there were also concerts in the evening. The defence is, that, as some of the work and labor contracted for was to be done on the Lord's day, it was forbidden by the Pub. Sts. c. 98, §§ 1, 2.

We have no doubt that the contract was an entire one. *Miner* v. *Bradley*, 22 Pick. 457, 459. *Clark* v. *Baker*, 5 Met. 452. *Morse* v. *Brackett*, 98 Mass. 205. *Mansfield* v. *Trigg*, 113 Mass. 350, 353. *Handy* v. *St. Paul Globe Pub. Co.* 41 Minn. 188. *McClanathan* v. *Friedel*, 85 Hun, 175; and 32 N. Y. Supp. 588.

If a person makes a contract in violation of the statutes for the observance of the Lord's day, he cannot maintain an action thereon. *Hazard* v. *Day*, 14 Allen, 487. *Myers* v. *Meinrath*, 101 Mass. 366. Such a contract is absolutely void and cannot be ratified. *Day* v. *McAllister*, 15 Gray, 433. *Stevens* v. *Wood*, 127 Mass. 123.

The principal ground on which the plaintiff contends that he is entitled to recover is, that the concert might have been licensed, and that, as the plaintiff was ignorant that the defendant had not procured a license, he is entitled to recover, under the principle laid down in *Emery* v. *Kempton*, 2 Gray, 257, and *Roys* v. *Johnson*, 7 Gray, 162. We are of opinion, however, that under the Pub. Sts. c. 98, §§ 1, 2, there was no authority in any person or board to license a concert on the Lord's day, except a

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concert of sacred music on the evening of that day; and that, as the plaintiff agreed to give concerts on that day, and not merely on the evening thereof, and actually did give them, he is precluded from recovery. The distinction between offences committed during the daylight of the Lord's day and after sunset thereof, has been taken since early times. Colonial Laws, 1660–1672, (Whitmore's ed.) 189, 190. Colonial Laws, 1672–1686, (Whitmore's ed.) 132, 133, 249, 250, 269. Prov. Laws, 1692–3, c. 22, 1 Prov. Laws, (State ed.) 58. Prov. Laws, 1711–12, c. 6, §§ 14–16, 1 Prov. Laws, (State ed.) 681. Prov. Laws, 1727–28, c. 5, § 2, 2 Prov. Laws, (State ed.) 456.

In the first statute passed by the Commonwealth on the subject, St. 1782, c. 23, where the Lord's day is declared to be "the time included between the midnight preceding and the sun sitting of the same day," the doing of certain things on the Lord's day is forbidden, and certain other things are prohibited on the evening next preceding or succeeding the Lord's day, and among them is being present "at any concert of music." This statute was repealed by the St. of 1791, c. 58, but its provisions were in substance re-enacted. See *Tracy* v. *Jenks*, 15 Pick. 465. This statute, however, differs from the preceding in prohibiting, in § 1, the being present at any concert of music on the Lord's day, or any part thereof, and in § 5 prohibiting the same thing on the evening next preceding or succeeding the Lord's day.

Under the St. of 1816, c. 112, § 1, which contains the words "on any part of the Lord's day or evening," it was held by this court that "the Legislature intended Sunday and the evening immediately following sunset on that day; and not the evening immediately preceding Sunday." *Commonwealth* v. *Newton*, 8 Pick. 234.

The Rev. Sts. c. 50, § 4, follow the St. of 1791 in its definition of the time included in the Lord's day, and § 5 provides, "No person shall be present at any game, sport, play, or public diversion, except concerts of sacred music, upon the evening next preceding or following the Lord's day." This we believe is the first time that concerts of sacred music are mentioned in our statutes relating to the observance of Sunday. Nothing is said about such concerts in the draft prepared by the commissioners, which followed the previous statutes.

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Section 3 of the Rev. Sts. c. 50, related to innholders, retailers of spirituous liquors, or other persons keeping a house of public entertainment. This was amended by the St. of 1844, c. 160, so as to include victuallers, and persons keeping shops, cellars, or any other place of public entertainment or refreshment. For the purposes of this section so amended, the Lord's day was declared "to include the time between the midnight preceding, and the midnight succeeding said day."

By the St. of 1858, c. 151, § 5 of the Rev. Sts. c. 50, was repealed, and the following section was enacted: "No person shall be present at any game, sport, play, or public diversion, except concerts of sacred music, upon the evening following the Lord's day; nor upon the evening next preceding the Lord's day, unless such game, sport, play, or public diversion shall have been duly licensed by the persons or board authorized by law to grant licenses in such cases."

In the Gen. Sts. c. 84, § 12, the Legislature made a general provision, for the first time, applicable to all the sections of the act, as follows: "The Lord's day shall include the time from midnight to midnight." This does not appear either in the report of the commissioners or in the amendments proposed by the committee of the Legislature. Section 4, however, contains the provisions of the St. of 1858, c. 151, relating to sacred concerts on the evening following the Lord's day, or on the evening of the day next preceding, though the word "following" was changed to "of."

The Pub. Sts. c. 98, follow the provisions of the General Statutes as amended, with some change in arrangement. In 1887, the words "or upon the evening next preceding the Lord's day" were struck out. St. 1887, c. 391, § 1.

As the law stood in 1893, while it implies that a sacred concert might be licensed on the evening of the Lord's day, and this could probably be done under the Pub. Sts. c. 102, § 115, yet we find no statute for licensing a concert of any kind on any other part of the day.

The decision of the learned judge of the court below, who found for the plaintiff, apparently was based upon the theory that a license could have been obtained; but this seems to us not warranted by the law in force at the time.

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Subsequently, the Legislature seems to have supposed that a license under the Pub. Sts. c. 102, § 115, might apply to the Lord's day, for there was added thereto the following proviso: "Provided, however, that in any city the mayor, without the concurrence of the aldermen, or the board of police commissioners in case there is such a board, may revoke or suspend such license for holding any such exhibition, show, or amusement on the Lord's day, if in the opinion of such mayor or board such revocation or suspension will be for the best interests of the public." St. 1894, c. 353.

Subsequently, the St. of 1894, and §§ 1, 2, of the Pub. Sts. c. 98, were repealed, and other provisions enacted. St. 1895, c. 434. But the validity of the contract must be determined by the law as it existed in 1893, and by that law, as we interpret it, no concert of any kind could be licensed on the Lord's day except after sunset. As the defendant could not have obtained a valid license for a concert of any kind in the afternoon of that day, we need not consider whether the concerts which were then given were sacred or not.

As there must be a new trial, we have no occasion to consider at length the requests asked for by the defendant. It is enough to say that they were in substance correct, and adapted to the case. *Exceptions sustained.*

SALLY B. CLARK *vs.* ANNETTA A. CLARK.

Worcester. September 28, 1896. — May 28, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Fraud — Misrepresentation — Deed — Evidence as to Change in Mental Capacity.

At the hearing on a bill in equity to set aside a deed alleged to have been obtained by fraud and misrepresentation from a woman advanced in years and incapacitated from attending to business, a witness who has known the grantor all her life may be asked, to show her mental condition at the time of the execution

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of the deed as compared with her mental condition when appearing in court, "State whether the plaintiff has failed or has not failed in her mental capacity during the past five years."

BILL IN EQUITY, filed February 25, 1896, to have a conveyance of land from the plaintiff to the defendant set aside and annulled, and a reconveyance thereof from the defendant to the plaintiff. The bill alleged that the plaintiff was old, infirm, and very deaf, and by reason thereof incapacitated from attending properly to business, and that the defendant, on April 30, 1892, fraudulently taking advantage of the plaintiff's incapacity, procured her to sign a deed of land in Chelsea without paying her any consideration therefor, and without informing her what the writing was, or what its effect was, and by falsely and fraudulently representing said writing to be a mere matter of form; that she was now informed that the deed was a deed of the above described land, and that it had been recorded in the registry of deeds; that there had been no previous agreement to convey the land, and that she had no knowledge that the writing was a conveyance of the land, and that she never intended to make any such conveyance.

At the trial in the Superior Court, without a jury, before *Sheldon*, J., the plaintiff, who was ninety years of age, was called as a witness by her attorney, and testified at length.

The plaintiff's attorney then called as a witness one Mrs. Gleason, a sister of the plaintiff, who had known her intimately all her life, and who had lived with the plaintiff during the two years preceding the date of the trial.

The plaintiff's attorney, expecting to show, and being prepared to show, the mental condition of the plaintiff at the time of the execution of the deed as compared with her mental condition when appearing in court, and that there had been but slight change in said condition, asked the witness the following question: "Please state whether your sister [the plaintiff] has failed or has not failed in her mental capacity during the past five years." The question was objected to by the defendant, and excluded, and the plaintiff excepted. No objection was made to the form of the question.

At the conclusion of the hearing, the judge entered a decree dismissing the bill; and the plaintiff alleged exceptions.

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The case was argued at the bar in September, 1896, and afterwards was submitted on briefs to all the justices.

H. Parker, for the plaintiff.

T. G. Kent, (*G. T. Dewey* with him,) for the defendant.

LATHROP, J. We have no desire in this case to depart from the rule early established, and often since recognized, that a witness who does not come within one of certain recognized classes cannot give an opinion as to the soundness of mind of a person.

In *Poole* v. *Richardson*, 3 Mass. 330, subscribing witnesses were allowed to testify as to the judgment they formed of the soundness of the testator's mind at the time of executing the will. (See also *Williams* v. *Spencer*, 150 Mass. 346.) "Other witnesses were allowed to testify to the appearance of the testator, and to any particular facts from which the state of his mind might be inferred, but not to testify merely their opinion or judgment."

In *Hathorn* v. *King*, 8 Mass. 371, attending physicians were first allowed to give their opinion. See also *Baxter* v. *Abbott*, 7 Gray, 71; *Hastings* v. *Rider*, 99 Mass. 622. And in *Lewis* v. *Mason*, 109 Mass. 169, the opinion of a person who had been the family physician some years before was held to be admissible, although he had not attended the testator for some years.

Experts in mental diseases are also allowed to give an opinion. *May* v. *Bradlee*, 127 Mass. 414, 421.

These are well recognized exceptions to the general rule. But the rule itself is well established. Thus, in *Commonwealth* v. *Wilson*, 1 Gray, 337, 339, a case of homicide in which the defence was insanity, the defendant's counsel was not allowed to ask a witness, who had testified to the appearance and conversation of the defendant at certain interviews he had had with the defendant before the homicide, what opinion of the prisoner's mental condition he formed at the time.

In *Commonwealth* v. *Rich*, 14 Gray, 335, a physician not an expert in mental diseases was not allowed to give his opinion on a hypothetical case as to the sanity or insanity of the defendant. Nor was he allowed, although he knew the defendant, to give his opinion as to whether he would be competent to apply the rules of right and wrong to any state of circumstances concern-

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ing which he was under high excitement, or in reference to which he was under the influence of an uncontrollable impulse.

In *Cowles* v. *Merchants*, 140 Mass. 377, this question was asked: "If you have an opinion as to the mental condition of Erastus Cowles on August 28, 1884, founded upon facts and circumstances within your personal knowledge, state what that opinion is, and the facts and circumstances upon which it is founded." This was held to be rightly excluded.

In *Smith* v. *Smith*, 157 Mass. 389, the general rule was followed, and this question to a witness was held inadmissible: "Whether, from the general appearance of the testator, he considered him capable of making a contract, or of transacting important business." See also *Hubbell* v. *Bissell*, 2 Allen, 196; *Commonwealth* v. *Fairbanks*, 2 Allen, 511; *Ashland* v. *Marlborough*, 99 Mass. 47; *May* v. *Bradlee*, 127 Mass. 414, 421; *Ellis* v. *Ellis*, 133 Mass. 469; *McConnell* v. *Wildes*, 153 Mass. 487.

It has, however, often been decided that a witness, although he does not come within one of the classes allowed to give an opinion, may testify to facts which are matters of common observation. Thus in *Commonwealth* v. *Dorsey*, 103 Mass. 412, a case of homicide, the testimony of a witness not an expert was held admissible, that hairs on a club appeared to be human hairs, and resembled the hairs of the person murdered.

So in *Parker* v. *Boston & Hingham Steamboat Co.* 109 Mass. 449, an action for personal injuries, the daughter of the plaintiff was allowed to testify: "The plaintiff is decidedly worse than she was two months after the accident. She is not able to do so much work as before."

In *Barker* v. *Comins*, 110 Mass. 477, a will case, these questions were allowed to be asked: "Did you notice any change in his intelligence or understanding?" "Did you notice any want of coherence in his remarks?" It was said by Mr. Justice Gray, in delivering the opinion of the court: "The questions to the witnesses produced at the trial were rightly admitted. They did not call for the expression of an opinion upon the question whether the testator was of sound or unsound mind, which the witnesses, not being either physicians or attesting witnesses, would not be competent to give. *Hastings* v. *Rider*, 99 Mass.

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622, 625. The question whether there was an apparent change in a man's intelligence or understanding, or a want of coherence in his remarks, is a matter not of opinion, but of fact, as to which any witness who has had opportunity to observe may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred." 110 Mass. 487.

In *Nash* v. *Hunt*, 116 Mass. 237, 245, a witness was allowed to testify that during a certain interview "he observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition." It was said by Mr. Justice Wells: "We do not understand this to be the giving of an opinion as to the condition of the mind itself, but only of its manifestations in conversation with the witness. So far as his mental condition was manifested to the witness by that interview, in conversation, looks, or demeanor, he could properly state, as a matter of observation, whether it was in the usual and natural manner of the testator or otherwise. 'Incoherence of thought' has reference to the ideas expressed or conveyed to the hearer, rather than to the condition of the mind of the speaker. There is no essential difference between these answers and those allowed in *Barker* v. *Comins*, 110 Mass. 477." 116 Mass. 251.

In *Commonwealth* v. *Sturtivant*, 117 Mass. 122, a case of homicide, one question was whether a witness, who was familiar with blood, and had examined with a lens a blood stain on a coat when it was fresh, could also testify that the appearance then indicated the direction from which it came, and that it came from below upward, although he had never experimented with blood or other fluid in this respect. The evidence was held to be competent. The general question was much discussed by Mr. Justice Endicott. 117 Mass. 132–137.

In *Commonwealth* v. *Brayman*, 136 Mass. 438, the defendant was indicted, on the Gen. Sts. c. 161, § 59, for conveying a certain parcel of land knowing that an encumbrance existed thereon, without, before the consideration was paid, informing the grantee of the existence and nature of such encumbrance. At the time of the conveyance, the defendant was sixty-nine years old, and the trial was six years after. He introduced evidence tending to show that his mind and memory were so enfeebled

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by age and infirmity as to render it probable that he had forgotten the prior encumbrance. One Bassett was asked "whether six years ago he had failed." This question was excluded, and for this reason a new trial was granted. Mr. Justice Colburn said: "We think that any witness of ordinary intelligence, who is familiarly acquainted with a person, may testify whether, within a given time, he has failed, mentally or physically." See also *Leistritz* v. *American Zylonite Co.* 154 Mass. 382; *Connors* v. *Grilley*, 155 Mass. 575; *Laplante* v. *Warren Cotton Mills*, 165 Mass. 487.

No doubt a question may be put in so ambiguous a form that the judge presiding at the trial would be justified in excluding it, as calling for an opinion as to the mental condition of the testator, or in requiring counsel to change its form. This was the ground upon which the court in *Ellis* v. *Ellis*, 133 Mass. 469, was of opinion that the exception to the exclusion of the question put in that case must be overruled.

The question which was excluded in the case at bar we are of opinion was admissible, within the rule laid down in *Commonwealth* v. *Brayman*, and the cases that preceded it.

Exceptions sustained.

MARY E. NICHOLS *vs.* LYNN AND BOSTON RAILROAD COMPANY.

Essex. March 3, 1897. — May 29, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Evidence of Custom.

At the trial of an action for personal injuries received by the plaintiff when alighting from a street car of the defendant, evidence tending to show that the car was a short, closed car, containing about fifty passengers, some of whom were standing on the rear platform; that when it was approaching a place where it always stopped without the ringing of the bell, a passenger on the rear platform rang the bell, and when the car stopped the conductor, who was inside collecting fares, called the name of the street and nodded his head to the plaintiff, who had indicated his desire to alight there; that passengers arose to go out, of

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whom the plaintiff, who was of advanced age and stout, was perhaps the last; and that, as he was in the act of stepping from the platform to the ground, the passenger standing on the rear platform, without authority from the conductor, rang the bell for the car to start, the car started suddenly, and the plaintiff was thrown to the ground and injured, — is competent to be considered by the jury on the question of negligence.

At the trial of an action for personal injuries received by the plaintiff while alighting from a street car, caused by the sudden starting of the car in response to a signal given by a passenger standing on the rear platform, evidence offered by the plaintiff tending to show a habit of passengers on the defendant's road to give the signals for starting and stopping cars is properly admitted.

TORT, for personal injuries, occasioned to the plaintiff while a passenger in Lynn, on a street car belonging to the defendant. At the trial in the Superior Court, before *Hammond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

H. F. Hurlburt, for the defendant.

W. H. Niles, for the plaintiff.

ALLEN, J. The plaintiff was entitled to go to the jury upon the question of the defendant's negligence. The facts in detail were not much in dispute. There was evidence, which the jury might have believed, tending to show that the car in which she was riding was not over fourteen feet long on the inside, and that there were upon it about fifty passengers, several of whom were standing upon the rear platform. At Breed Street there was a regular stopping place, where the car always stopped, and there was no need to ring the bell for it to stop there, and the conductor did not ring the bell on this occasion for the car to stop, but a passenger upon the rear platform rang it. The plaintiff had told the conductor that she wished to be left there, and when the car stopped he called Breed Street, and nodded to her. He was inside of the car collecting fares, and was nearer the front end than she was. Other passengers, according to the conductor's testimony, rushed out, and the plaintiff, being well along in years and stout, was perhaps the last to go. She walked to the rear door, passed out, and was in the act of stepping from the platform to the ground, when the car started up suddenly, and she was swung off, but held on and was dragged a little way. The conductor testified that he had got there by that time and caught hold of her by the arm; but she testified that nobody seized her before the car stopped. The evidence

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left no doubt that the same passenger who rang the bell for the car to stop, also rang it for the car to start again. The conductor testified that he did not hear either the signal to stop or to start, and he had given no authority to the passenger to do so. He also said: "Sometimes a passenger has rung the bell to start; there are people who make themselves officious upon the car; it is not a common occurrence in running a car." There was some evidence which had a tendency to show that this was sometimes done; and the jury might well think that the risk from this source was greater in case of a car crowded with standing passengers.

The plaintiff, it would seem, was in the exercise of due care, and no suggestion is made to us to the contrary; and the jury might have found that there was lack of due precautions, under the circumstances, to prevent the starting of the car through an unauthorized act of a passenger in ringing the bell.

While the defendant was not bound to adopt all possible precautions to protect its passengers from injury in leaving its cars, it was bound to use the utmost care consistent with the nature and extent of its business to guard against all dangers which it could reasonably anticipate; and if the defendant failed in this duty, it is responsible for the consequences of its neglect, although the negligence or misconduct of the passenger who rang the bell contributed to the injury. *Eaton* v. *Boston & Lowell Railroad*, 11 Allen, 500. *Simmons* v. *New Bedford, Vineyard, & Nantucket Steamboat Co.* 97 Mass. 361. *Dodge* v. *Boston & Bangor Steamship Co.* 148 Mass. 207. *Anderson* v. *Citizens' Street Railroad*, 12 Ind. App. 194. *North Chicago Street Railroad* v. *Cook*, 145 Ill. 551.

It was competent for the jury, upon the evidence, to find that the defendant failed in its duty in allowing the car to be started up as it was, or in not taking greater precautions to prevent its being so started up, before the plaintiff had time to get safely off.

It was competent for the court to admit evidence tending to show a habit of passengers upon the defendant's road to give the signals for stopping and starting cars, because the defendant had reasonable cause to know anything that was habitually and openly done on its cars, and the evidence bore directly upon the

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question of its due care in permitting, or in failing to guard against, such acts. And in this aspect, evidence of what was habitually done on other cars of the defendant than the one upon which this conductor had served was admissible. Moreover, he knew perfectly well that this was sometimes done, and testified that "of course we would forbid them from doing it; it is not allowed." The conductor knew enough to put him on his guard. There was no ruling by the court that the practice on other roads was competent.

We cannot see how it was material to inquire whether there was evidence of negligence after the signal to start had been given, provided the jury should find that there was negligence in allowing that signal to be given. But the jury might think that the conductor was negligent in failing to hear, and at once to countermand, the signal to start, not to mention other possible aspects of the case. *Exceptions overruled.*

GEORGE W. HAMMOND, trustee, *vs.* P. M. THOMPSON.

Suffolk. December 11, 1896. — June 1, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Termination of Tenancy at Will by Conveyance of Landlord — Rent.

At the trial of an action for rent, it appeared that the defendant was a tenant at will of the plaintiff, at a certain monthly rental, "payable after the termination of each month of the tenancy"; that the agreement was made on September 15, 1894, and by its terms the defendant forthwith entered upon his tenancy; that on October 14, 1895, at 2.30 P. M., the plaintiff conveyed the premises to a third person, with an understanding between them, unknown to the defendant, that he should occupy until he should receive one month's notice to quit, and that he remained in possession during the month for which the action was brought. *Held*, that the conveyance by the plaintiff terminated the tenancy at will, and that the action could not be maintained.

CONTRACT, for rent. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

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H. Dunham, for the defendant.

E. F. McClennen, for the plaintiff.

LATHROP, J. The defendant was a tenant at will of the plaintiff, at a monthly rental of $35, "payable after the termination of each month of the tenancy." The agreement was made on September 15, 1894, and by its terms the defendant forthwith entered upon his tenancy. On October 14, 1895, at half past two o'clock in the afternoon, the plaintiff conveyed the premises to a third person, with the understanding between them, which was however unknown to the defendant, that the defendant should be permitted to occupy until he should receive one month's notice to quit; and in fact he remained in possession during the month for which this action is brought. The only question is whether the conveyance by the landlord terminated the tenancy at will.

This question is to be determined by the principles of the common law, for the provisions of the Pub. Sts. c. 121, §§ 8, 9, are not applicable.

The general rule on this subject in this Commonwealth is that the rent for a period of time is an indivisible item, and if the lessor or landlord conveys the premises before the rent accrues, he cannot recover what otherwise he would be entitled to. This rule applies, although there has been no eviction by the holder of the new title, or an attornment to him. *Fuller* v. *Swett*, 6 Allen, 219, n. *O'Brien* v. *Ball*, 119 Mass. 28. *Dexter* v. *Phillips*, 121 Mass. 178, 180. *Emmes* v. *Feeley*, 132 Mass. 346. See also *Robinson* v. *Deering*, 56 Maine, 357; *Cameron* v. *Little*, 62 Maine, 550.

The plaintiff contends that the last day of the monthly term, namely, October 14, was the day on which the rent accrued, although not payable until the next day; that in law there are no fractions of a day; and that therefore the defendant is liable.

We have no doubt of the correctness of the first proposition. 3 Dyer, 345 *a*. *Regina* v. *St. Mary, Warwick*, 1 El. & Bl. 816. *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378. *Bay State Bank* v. *Kiley*, 14 Gray, 492. *Fox* v. *Nathans*, 32 Conn. 348. *Petsch* v. *Biggs*, 31 Minn. 392.

While there is a general rule that the law does not regard the

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fractions of a day, yet, when it is important for the rights of the parties to determine which of two events happening on the same day is to have priority over the other, the law does not hesitate to pass upon the question. *Bigelow* v. *Willson*, 1 Pick. 485, 495. *Golden* v. *Blaskopf*, 126 Mass. 523, 525.

As the law formerly stood, rent was payable at such a convenient time before sunset on the day it fell due as would be sufficient to have the money counted. Gilbert, Rents, 91. Swanston's note to *Ex parte Smyth*, 1 Swanst. 337, 343. While this was the rule of law, several cases came before the courts where the lessor died on the last day of the term, and the question was whether the rent should be paid to the heir or remainderman on the one hand, or to the personal representatives of the deceased on the other. These cases are collected in Mr. Swanston's note; and it appears that the court took notice of fractions of a day.

In *Smith* v. *Shepard*, 15 Pick. 147, a mortgagor in possession leased the premises, the lessee covenanting to pay rent in advance quarterly. On a day when rent was due the mortgagee entered for a breach of condition in the mortgage, and threatened to expel the lessee unless he would agree to pay rent to him. The lessee paid the rent to the mortgagee. The mortgagor thereupon sued the lessee for the rent, and what was done was held to be an eviction, and a good defence to the action. Chief Justice Shaw said: "As to the quarter's rent due by covenant in advance, the defendant had the whole day to make the payment in advance. But during the day, the mortgagee entered and ousted him, and this was a good excuse." See also *Welch* v. *Adams*, 1 Met. 494. If rent in such a case had accrued and was payable before the entry, although not paid, the mortgagee would not be entitled to it. *Massachusetts Hospital Life Ins. Co.* v. *Wilson*, 10 Met. 126. But where no rent has become payable at the time of the entry, and the lessee has attorned to the mortgagee, the lessor cannot maintain an action against the lessee upon a *quantum meruit*, for use and occupation before the entry.

In the case at bar, the defendant's rights cannot be any greater than if the rent had been payable on October 14. In that case he would have had until midnight to pay the rent. Be-

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fore the rent was demandable, the plaintiff conveyed the premises, and thus put an end to the tenancy; and we see no ground upon which he is entitled to recover.

Judgment for the defendant.

PAUL ATKINS *vs.* DANIEL F. LEWIS.

Barnstable. January 12, 1897. — June 1, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Contract — Labor and Supplies furnished Fishing Vessel — Part Owner — Agency — Revocation of Authority.

At the trial of an action by A. against B., a part owner of a schooner, for labor and supplies furnished in fitting her out for a fishing voyage, it appeared that A. was employed by C., who was another part owner and had been for several years the managing owner; that before the labor and supplies were furnished B. gave notice to C. not to incur any further expense on the schooner on his account; that A. did not know of this; and that B. gave no notice, except to C., of his intention not to join in the enterprise for which the schooner was fitted. B. knew of the fitting, but it did not appear that he knew that A. was furnishing the labor and supplies, nor did it appear that A. had had any previous dealings with C., and there was no evidence of his knowledge of C.'s relation to the vessel. *Held*, that the action could not be maintained.

CONTRACT, to recover of a part owner of a schooner for labor and supplies furnished in fitting her out for a fishing voyage. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon the findings of an auditor as an agreed statement of facts, the nature of which appears in the opinion.

R. A. Hopkins, for the plaintiff.

G. A. King, for the defendant.

MORTON, J. This is an action to recover of the defendant, as part owner, for labor and supplies furnished in fitting out a schooner for a fishing voyage. The plaintiff was employed by one Whorf, who also was a part owner, and who for several years had been the managing owner. Before the labor and supplies were furnished, the defendant gave notice to Whorf not to incur any further expense on the schooner on his account. The

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plaintiff did not know of this, and the defendant gave no notice, except to Whorf, of his intention not to join in the enterprise for which the schooner was fitted out. He knew that she was being fitted out when the labor and supplies were furnished, but it does not appear that he knew that the plaintiff was furnishing them. Neither does it appear that the plaintiff had had any previous dealings with Whorf, or what he knew concerning Whorf's relation to the vessel.

The plaintiff relies on the power of Whorf, as part owner and as managing owner, to bind the defendant. But we do not think that he had power simply as a part owner to bind him. Part owners of a vessel are not partners by virtue of their ownership. They are tenants in common. *French* v. *Price*, 24 Pick. 13. *Starbuck* v. *Shaw*, 10 Gray, 492. *The Larch*, 2 Curt. C. C. 427. *Frazer* v. *Cuthbertson*, 6 Q. B. D. 93. *McLellan* v. *Cox*, 36 Maine, 95.

They are not the agents one of another, with power to bind each other in regard to matters relating to the ship. No relation of agency necessarily arises out of the character of their ownership. Under some circumstances an agency will be implied perhaps, as, for instance, when one part owner has acted without objection or dissent from the others in regard to repairs or supplies. *McCready* v. *Thorn*, 51 N. Y. 454. And from the nature of the property there may be good reason for implying an agency more readily than in the case of other chattels owned in common. But to enable one part owner to bind another, something more than the fact of part ownership, and that the repairs or supplies were reasonable or necessary, must appear. There must be an agency of some sort, or such circumstances as to preclude the part owner whom it is sought to charge from denying his liability. *Brodie* v. *Howard*, 17 C. B. 109. Reference is made in a leading text book to the rule laid down by some foreign writers, that one part owner can bind another for repairs, but the learned author remarks that he has not found the rule adopted in practice in any country. Abbott, Merchant Shipping, (13th ed.) 84.

In the present case, if Whorf was ever appointed or authorized to act as his agent by the defendant, the power to do so was revoked before the supplies and labor were furnished. It makes

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no difference that the plaintiff did not know of it. If the defendant had sold his interest, he would not have been obliged to give notice to the plaintiff to avoid liability for repairs subsequently made. *Hussey* v. *Allen*, 6 Mass. 163. Leaving out of the question parties accustomed to dealing with an agent of whose appointment as such they had knowledge, we do not see that the reason is any stronger for requiring notice of an express revocation than of a revocation which takes place by operation of law in consequence of a sale. See *Brodie* v. *Howard*, *ubi supra*; *Mitcheson* v. *Oliver*, 5 El. & Bl. 419. There is nothing, as already observed, tending to show that the plaintiff had ever dealt with Whorf before the transactions in question, nor, further, that he relied on any holding out by the defendant of Whorf as his agent, or that the defendant held him out or suffered him to act as such after he had revoked his authority. After the defendant had expressed his dissent to fitting the vessel for the proposed voyage, we think that Whorf as managing owner had no authority under the circumstances to bind him. *Frazer* v. *Cuthbertson*, *Brodie* v. *Howard*, and *Mitcheson* v. *Oliver*, *ubi supra*. *Bowen* v. *Peters*, 71 Maine, 463. *Stedman* v. *Feidler*, 20 N. Y. 437. Abbott, Merchant Shipping, (13th ed.) 92.

It appears from the writ and other papers in the case that the parties all lived in Provincetown, and that the vessel belonged there. It is objected by the defendant that Whorf would not have power to bind the defendant for repairs in the home port. As part owner merely, for reasons already given, he clearly would not. *Hardy* v. *Sproule*, 31 Maine, 71. So far as he was managing owner, we do not see why he had not the power to bind those whose agent he was, in the home port as well as elsewhere. It is to be observed that the fact that the repairs and supplies were furnished in the home port would have rendered it easier for the plaintiff to ascertain, as he was bound to do, whether Whorf had power to bind the defendant, if he relied on his authority as managing owner. *The Valencia*, 165 U. S. 264. Mechem, Agency, § 274. He does not appear to have made any effort to do so, and his supposition or belief that Whorf had such power is not enough.

Judgment affirmed.

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JOHN M. BROOKS *vs.* ELIZA STACKPOLE & another.

Suffolk. November 19, 1896. — June 4, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Promissory Note — Indorser and Co-maker — Declaration in Set-off — Statute.

Though a person who indorses a note before delivery to the payee is entitled to notice as an indorser under the Pub. Sts. c. 77, § 15, he is in all other respects a co-maker, and cannot, under the Pub. Sts. c. 168, § 8, file a declaration in set-off for a debt due to himself alone.

CONTRACT, upon a promissory note, against Eliza Stackpole and Stephen Stackpole, the last named of whom filed a declaration in set-off, consisting of a debt due to himself alone; and the plaintiff demurred, on the ground that the demand in set-off was due to only one of the defendants, and not to both jointly. The Superior Court sustained the demurrer, and Stephen Stackpole appealed to this court. The material facts appear in the opinion.

S. H. Dudley, for Stephen Stackpole.

O. Storer, for the plaintiff.

LATHROP, J. The promissory note in suit, so far as it is material to state it, is as follows: "$412.00. Saugus, May 16, 1881. Six months after date I promise to pay to the order of John M. Brooks four hundred and twelve dollars. Value received. Eliza Stackpole." On the back of the note is the name of the defendant Stephen Stackpole. The declaration alleges the making of the note by the first named defendant; that the last named defendant indorsed the note before the delivery thereof to the plaintiff; that demand was duly made on the maker, who neglected to pay the same; and that due notice thereof was given to the last named defendant. The declaration concludes in the usual manner, that the defendants owe the plaintiff the balance of said note, and interest thereon.

The defendants filed an answer containing a general denial, and the defendant Stephen Stackpole filed a declaration in set-off. To this the plaintiff demurred on the ground that the demand in set-off was due to only one of the defendants, and not to both

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of them. This demurrer was sustained, and an appeal taken to this court. Subsequently, the case was tried, and a verdict rendered for the plaintiff. The case is now before us on the appeal of Stephen Stackpole.

The contention in favor of the declaration in set-off is based upon the theory that the defendants in this action were severally liable, one as maker and the other as indorser; that, although these several liabilities could be enforced in one action and in one count, under the Pub. Sts. c. 167, § 4, this section required several judgments according to the several contracts of the defendants, and that one defendant could set off his individual claim against the plaintiff under the Pub. Sts. c. 168.

But this is not the case made by the pleadings. The defendant Stephen Stackpole was not an indorser, although under the Pub. Sts. c. 77, § 15, to fix his liability, he was entitled to "notice of non-payment the same as an indorser." In all other respects he is to be considered as a co-maker of the note. *Mulcare* v. *Welch*, 160 Mass. 58. *State Trust Co.* v. *Owen Paper Co.* 162 Mass. 156. *Legg* v. *Vinal*, 165 Mass. 555.

The case therefore falls clearly within the provisions of the Pub. Sts. c. 168, § 8. *Walker* v. *Leighton*, 11 Mass. 140. *Warren* v. *Wells*, 1 Met. 80. *Rawson* v. *Rawson*, 105 Mass. 214. *Barnstable Savings Bank* v. *Snow*, 128 Mass. 512.

The order of the Superior Court sustaining the demurrer to the declaration in set-off must, therefore, be *Affirmed.*

JOSEPH SAVOY & another *vs.* GEORGE A. DUDLEY & another.

Middlesex. January 26, 1897. — June 14, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Mechanic's Lien — Rights of Mortgagee.

At the trial of a petition to enforce a mechanic's lien, it appeared that the petitioner was under a general contract for service with the prior contractor, and began to

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work upder it upon the respondent's house before a mortgage thereon was recorded; that he continued such work regularly until the house was ready for plastering, when he was ordered by his employer to work on a house on an adjacent lot and elsewhere; that on his order he returned to work on the respondent's house; and that there was nothing to indicate at any time any change in his contract in reference to the house until he finally ceased to work upon it. *Held*, that the interruption of the petitioner's work was temporary, that the work itself was done under the same contract, not only in reference to his relations to his employer, but also in reference to his relation to the building, and that his lien took precedence of the mortgage.

TWO PETITIONS, to enforce mechanic's liens under Pub. Sts. c. 191. The cases were submitted to the Superior Court, and, after judgment for the petitioners, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

The case was submitted on briefs to all the justices.

C. F. French, for the mortgagee.

J. L. Harvey, for the petitioners.

KNOWLTON, J. The questions in this case are between claimants of liens for the work done in the erection of a building, and the mortgagee of the building. It is provided that a "lien shall not avail or be of force against a mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed." Pub. Sts. c. 191, § 5. It has been decided that the contract referred to in this section is the contract of the party claiming the lien, and not the contract of a prior contractor for whom the claimant is working. *Batchelder* v. *Hutchinson*, 161 Mass. 462. *Bowen* v. *Phinney*, 162 Mass. 593. The principles stated in *Batchelder* v. *Hutchinson* are decisive of the present case. The original contract for the erection of a building would fix the date from which the lien of the original contractor would have precedence over any mortgage subsequently recorded. The rights of one of his employees in this respect would be fixed from the date when the employee contracted to work on the building. If the employee was a journeyman, hired only to work wherever his employer might put him, and the employer was building several houses at the same time, his agreement would not become a contract to work upon any particular building that would be effectual to give him a lien upon it until he was set to work on that building. It is usual for builders who are constructing several houses at the same time to change individual employees from one job to another, as the nature of the business

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and the exigencies of the work from time to time make it desirable for them to do. When one is under a contract with a builder who is erecting numerous houses to work upon any house where the builder chooses at any time to put him, the contract fairly to be implied when he is set to work upon a particular house is to work upon it as much of the time as the builder chooses to keep him there until it is finished. For various causes his work may be interrupted from time to time; if he is a carpenter, it may be necessary to suspend his part of the work until the plasterers or other mechanics have done their part. He may be obliged to stop on account of illness, or the interests of his employer may make it important to transfer him temporarily to another job. In any of these cases, if there is no change in the arrangement, either expressly or by implication, and he continues to labor on the house except as from time to time he is temporarily set to work by his employer on another job, it being understood by both parties that he is under an arrangement which includes labor for that house, and which has been applied to that house by an actual performance of labor upon it, his labor on the building is all performed under one contract, and a certificate for a lien, seasonably filed after he ceases to work upon it, will cover his labor from the beginning. The labor must all have been done under one continuing contract, but it is not necessary that he should have worked continuously. If, however, his relations to the building under his contract are terminated, and he afterwards goes back to work upon it under a new contract, his lien for his later work must be founded on his new contract, and his rights as against the mortgagee will be determined by the date of the new contract.

In the present case each of the petitioners was under a general contract for service with the prior contractor, and each of them began to work under it upon the respondent's house before the mortgage was recorded. They each continued to work on this house in the regular course of their employment, until the house was ready for plastering, when they were ordered by their employer to work on a house on an adjacent lot. They also worked elsewhere, as ordered by their employer, and on his order returned to work on the respondent's house. There is nothing to indicate that at any time after they began to work

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on this house there was any change in their contract in reference to the house until they finally ceased to work upon it. The interruption of their work seems to have been nothing more than temporary, on account of the condition of the building or the convenience of their employer.

We are of opinion that the fair interpretation of the agreed facts shows that the work of each of the petitioners for which he claims his lien was done under the same contract, not only in reference to his relations to his employer, but also in reference to his relation to the building on which he claims his lien.

Judgment affirmed.

NEWBURYPORT WATER COMPANY *vs.* CITY OF NEWBURYPORT.

Essex. March 18, 19, 1897. — June 14, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Interpretation of Rule to Commissioners — Report to the Court — Statute — Valuation of the Property of a Water Company purchased by a City — Evidence — "Net Earnings" — "Tax Returns" — Rates of Insurance — Costs.

Where a rule is given by statute to commissioners to determine the fair value of the property of a water company for the purposes of its use by a city which is authorized to purchase it, the award of the commissioners when accepted by this court to be final, it is proper that the manner in which the rule has been interpreted and carried out should be reported for the supervision of the court before the acceptance of the report of the commissioners.

Under St. 1894, c. 474, entitled "An Act to provide for the purchase of the property of the Newburyport Water Company by the city of Newburyport," it is proper that no allowance should be made for the city's right to lay and maintain pipes in the streets and its right to collect water rates.

Where it is the duty of commissioners under a statute to find the fair value of the property of a water company for the purposes of its use by a city, which is authorized to purchase it, and they are to find that value "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company," the exclusion of evidence of the net earnings of the company in the past, at a hearing on a petition by the company for a valuation of the property so purchased by the city, is not a sufficient ground for recommitting the report of the commissioners.

Where the officer who made the tax returns setting forth the value of the stock of

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a water company is called by that company at a hearing on its petition for a valuation of its property, which has been purchased by a city, and testifies to the value of that property, on cross-examination the respondent may be allowed to identify the tax returns made by him and to put them in, if they have some tendency to show a smaller value of the property than that given on the stand by the witness, and so to contradict him.

At a hearing before commissioners on a petition by a water company for a valuation of its property purchased by a city conformably to a statute, the respondent introduced evidence that a few days before the transfer to it of the property of the company the rates of insurance were advanced in the city because of defects in the water system. *Held*, that its introduction did no harm beyond tending to prove that the water works were not as good as the average, a fact which if proved could hardly affect the valuation as the commissioners arrived at it.

At a hearing before commissioners on a petition by a water company for a valuation of its property purchased by a city conformably to a statute, evidence having been introduced as to the price obtained by the contractor, who built the works for the company and who owned most of the stock, for some of his shares sold by him soon after the works were constructed and a number of years before the petition was brought, the court said that it was not prepared to say that the evidence was inadmissible, but it gave a value for the total property so far away from the award that it was not necessary to discuss the question, since it was not adopted as a standard.

At a hearing before commissioners on a petition by a water company for a valuation of its property purchased by a city conformably to a statute, evidence of the sum paid by the city after the property was conveyed to it to a person for the use of his spring, as bearing on the value of the water, having been admitted, the court said that the evidence did not appear to be open to the objection that his acceptance of the sum was compulsory, or that it was very different from the price paid by the petitioner for water from the same spring not long previous to the conveyance.

It is within the power of commissioners appointed under a statute to determine the valuation of the property of a water company purchased by a city to award the costs of the reference.

PETITION under St. 1894, c. 474, for the appointment of three commissioners to determine the valuation of the petitioner's water plant purchased by the respondent city.* The court

* Sections 1 and 2 of St. 1894, c. 474, are as follows:

"Section 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport in writing that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants, under the authority of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is author-

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appointed Everett C. Bumpus, John R. Freeman, and John W. Ellis, commissioners, and they made the following report:

The company, acting under St. 1880, c. 235, entitled "An Act to incorporate the Newburyport Water Company," built its water works and supplied water to the inhabitants of the city of Newburyport from 1881 until the transfer of the property to the city on January 29, 1895. At this time the company was supplying 2,246 takers, by means of which some seven tenths of the population of the city were receiving water for domestic purposes; and the city, in its municipal capacity, was being supplied for fire purposes under a contract it had made with the company. The water takers connected their respective premises with the system by undergoing the expense of having a pipe run upon their premises to their buildings from the company's mains and service branches in the streets, the company paying all other expenses in making such connections. The net income derived by the water company from its works in 1894 was $31,180.56. The company, since 1881, had laid in the streets of the city

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ized to purchase the same. Whenever said city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall within twenty days after the vote aforesaid execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meeting a majority of the voters present and voting do not vote to purchase said property, other meetings may be called and held therefor. In case the said city and the said company shall be unable to agree upon the value of said property, the Supreme Judicial Court shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company.

"Section 2. In case said Newburyport Water Company shall convey its property to the city of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the provisions of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three."

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many miles of its piping, its hydrants, and other appliances used in connection with the water plant.

The award was made upon the following principles:

"Section 1 of chapter 474 in terms directs us to put a fair value upon the property for the purposes of its use by the city, and further provides that this value shall not be enhanced on account of the future earning capacity or good will, or of the franchise of the company. To determine the fair value of the property for the purpose of its use by the city, as to any part that had any value in use to the city, we have valued the same at its value for that use at the time of the transfer. We have, as we think the statute so directs us, excluded from consideration the future earning capacity and good will of the plant, and have not valued any franchise right whatever which the company owned or held at the time of the transfer, except its rights to take water as acquired and exercised by the taking under St. 1880, c. 235, § 2. Neither have we, for the same reason, taken into consideration the earning capacity, whether past, present, or future, or any income which the company had or might have derived from its plant.

"Subject, then, to these rules, we have valued the property in its entirety as a plant in full operation, engaged in supplying its water for domestic and municipal purposes, and in so doing we have taken into consideration the following elements of valuation, and excluded all others:

"1. Cost of reproduction of all that part of the physical plant used in pumping and delivering water, less any depreciation. This method was employed without objection by all the experts who testified.

"We have further valued the following:

"2. All lands and buildings and easements in and to lands used for piping, and other appliances of the Water Company, not included within the real estate connected with the pumping station.

"3. The personal property.

"4. All books and plans conveyed to the city.

"5. Water collected in the reservoir and wells upon the date of the transfer.

"6. The water right of the company, taking into account not only the land, reservoir, dams, and everything else that created

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the water right, but also the quantity and quality of water that gathers at this point, and its adaptability to the purposes for which it was in use when sold.

"We have valued this right at what we have deemed it was worth for the purposes of its use by the city, taking into account its capacity, adaptability, usefulness, and connection with and relation to the plant, and having regard to the fact that we are valuing, not what income its water had yielded or might yield in conjunction with the rest of the property, but the value of the right to have water gather at this place to be used for such purposes. It appeared upon the evidence presented that there was only one other practicable source of supply that could be availed of to supply the city and its inhabitants with the same quantity of water that had been supplied by the company, and some question was made as to the quality coming from this source. We heard evidence offered as to the probable cost of creating and maintaining a water right at this source to take the place of the water right used by the company, and, with the other elements above referred to, have taken this evidence into consideration in passing upon the value of the water right conveyed to the city.

"7. We further find that the plant was a going concern and in full operation at the time of the transfer, — one that had been tested by experience and with which the city could begin the immediate prosecution of the business of supplying water to the established connections for domestic and municipal purposes (including in the latter hydrant service), — and upon an examination of these facts are of opinion that the property had a greater value for the purposes of its use by the city by reason thereof, than if the plant had not been in full operation, and that this should be considered in passing upon the value of the entire plant. This enhancement we have fixed upon as adding to the value of the property the sum of $40,000. In passing upon the same, we have not made the income derived from the business its element or basis, or any other factor than that above stated."

They further report that, "In estimating the value of the property transferred, we allowed for the cost of reproducing this piping, these hydrants, and other appliances, as appears in clause 1 of our elements of valuation; but we have not, in that element or in any other of the elements of valuation, taken into consider-

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ation or valued the exercise of this right, or the right itself, to so use the streets up to the time of the transfer; and whether or not we should so value we leave to the determination of the court, further stating that, upon the evidence presented to us, the exercise of this right and the right itself were valuable. It did not appear upon the evidence presented that the company paid anything to the city for this right, unless it formed part of the consideration of the company's supply of water to the city under a contract made between the city and the company to so supply, but the evidence upon this question was not so definitely presented as to enable us to determine whether it entered into the consideration or not."

They thereupon found that the fair value of the property, for the purpose of its use by the city, upon January 29, 1895, was $275,000, with interest.

After this finding, at the request of the parties, and upon their agreement made in the course of the hearing that any questions of law raised by either party should, at the request of such party, be reserved for the consideration of this court upon the question of the acceptance of the award, certain reservations so made by the parties were reserved, all of which were subsequently waived by the parties except the following, which were reserved at the request of the petitioner.

1. The petitioner called John E. McCusker, superintendent, clerk, assistant treasurer, and a director of the company, who had always kept or supervised the keeping of its books and accounts, who testified concerning the construction of the work, the business of the company, fitness of the works for the use of the city, value of the personal property, and other subjects, by whom it appeared that the works were originally built by George H. Norman in 1881, under a contract with the company, the contract price being $295,000. The company had an authorized capital of $300,000, divided into 3,000 shares, each with a par value of $100. 2,902 shares of the stock were issued in 1881 to Mr. Norman, who is and always has been the treasurer and the largest stockholder of the company, in payment for the work of construction done under the contract. The respondent, against the petitioner's objection and exception to the admission of same, was permitted to ask McCusker, as part of his cross-examination

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and as bearing on the original cost and character of the construction of the works, as to the price at which Norman sold some of his stock in 1882, and how much of his stock was so sold by him, to which he answered that Norman then sold about 2,072 shares at $60 per share. This valuation of the stock was materially less than the value of the property represented by it as claimed by the petitioner in this case. Later, the petitioner, as part of its case in chief, called Norman as a witness, and examined him fully as to the construction of the works and the business affairs of the company, and as an expert on the value of its property; and in the course of his examination by the petitioner and by reason of the fact that McCusker had testified to the same and in explanation of the same, in reply to inquiries by the petitioner's counsel, he testified to the same facts relating to the sales of stock as were testified to by McCusker as above stated, and he further testified to the same facts, without objection, in the cross-examination by the respondent.

2. In cross-examination of Norman, who had testified to the cost of construction of the works and the value of the company's property, the respondent was permitted to identify by him and put in evidence, against the petitioner's objection and exception to the same, the returns for the years 1882 to 1894 inclusive, made under Pub. Sts. c. 13, § 38, signed and sworn to by the witness, as treasurer of the company, to the tax commissioner of the Commonwealth for the purposes of taxation, in which the market value of the stock of the company was stated at different amounts in the various years from $33 to $90 a share, on which basis the property of the company was worth much less than the amount claimed and testified to by Norman. Upon redirect examination, Norman stated that at the time that he made these returns the stock was not selling in the market at all.

3. The respondent, as bearing on the value of the property of the company, especially with reference to fire protection, called as a witness Nevitt S. Bartow, who testified that the New England Insurance Exchange is an association of insurance companies which fixes the rates of insurance in New England, and that he was a member of the executive committee of such exchange and chairman of the committee thereof which had jurisdiction with regard to the fixing of insurance rates in Newburyport and

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vicinity. His attention was called to the condition of Newburyport with respect to the fire protection after a large fire there, which occurred on October 31, 1894, and that, in consequence of said fire, he visited Newburyport and made a personal investigation of the efficiency of the water plant for fire protection.

The respondent then asked the witness, "Can you tell what the rates of insurance were in Newburyport in January, 1895?" To which he answered that in January, 1895, the insurance rates in Newburyport were based upon the efficiency of the water supply.

He was further asked how the insurance rates of Newburyport in January, 1895, compared with the standard rates of the New England Insurance Exchange. He stated that on January 26, 1895, the insurance rates of Newburyport were advanced 25 per cent over the standard rates established on that date by said Exchange in other places in the vicinity of Newburyport.

He was further asked, "Was such increase of 25 per cent in the insurance rates of Newburyport made because of the superior efficiency of the water plant, or because of supposed inefficiency of it?" And the witness answered as follows: "The system developed certain weaknesses which we considered made the system inefficient. Grave defects were discovered, which led to that advance of rate." And he further stated that such advance took effect upon January 26, 1895, and continued in effect until May 1, 1895.

It did not appear that the witness was qualified as an expert to testify in the premises, and the foregoing evidence was not permitted on that ground, but for the purpose of showing as a fact that the insurance rates were so advanced for the reasons stated in the evidence.

To all this testimony of the said Bartow, the petitioner duly and seasonably objected, and excepted to the admission of the same.

4. It appeared that there was a water source known as Jackman Spring, some 1,500 feet distant from the wells and reservoir of the company, and that McCusker, early in 1893, had made an arrangement with one Henry M. Jackman, who did not have a record title to the land, or any title thereto by possession, so far

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as it appeared, or any ownership in said spring, but who claimed to own it, and who exercised some acts of ownership and of possession over the same, by which the Water Company built a dam and made certain excavations upon said land, and in 1893 and 1894 pumped from time to time water from the said spring into the reservoir of the company, the amount so pumped being estimated or approximately determined in the testimony to have been 42,000,070 gallons per year. The company paid to the said Jackman for the use of the premises, including the water, and for some wood upon the premises, the sum of $275, and took the following receipt therefor: "Newburyport, Jan. 14, '95. Received of the Newburyport Water Company $275.00 in full of all claims and demands against said company to date. Henry M. Jackman."

The respondent, upon a claim that it appeared already upon the record, or, if not, the evidence would be forthcoming, that $275 per annum was paid to the said Jackman for said water, as bearing upon the value of the water at the company's works or in its immediate vicinity, against the petitioner's objection and exception duly taken, and in answer to the petitioner's evidence that the water at the company's works was worth from $90 to $150 per million gallons, put the following question to an expert called by it: "Have you made an estimate or a computation of the value or cost of the water of the Jackman Spring, based on the assumption that the right to what has been pumped there for a particular year cost $275?" And the witness answered, "I made the computation on the basis that the gauging of the stream, Jackman Spring, showed a flow of 118,000 gallons a day, making a net flow for the year of 42,000,070 gallons, and on a basis of payment for the use of that water of $275, it figures $6.55 per million gallons."

It further appeared that no other person or persons had been paid by the company for the use of the water at Jackman Spring during the time covered by the receipt.

No other evidence bearing on the payment for the use of this water for this time was introduced.

5. The respondent, for the same purpose for which it put the above question, put also the following question to the same witness, against the objection and exception of the petitioner:

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"Have you made an estimate or computation of the value or cost of the water of Jackman Spring, based on the assumption that the rights to what has been pumped there for a particular year cost $365, or $1 per day?" And the witness answered, "Eight dollars a million gallons." This question was allowed on the undertaking of the respondent to show that such an arrangement had been made. The only evidence subsequently offered by the respondent on this subject is stated in paragraph 6.

These estimates of value concerning the Jackman Spring were materially less than the estimates for the value of the water from the petitioner's land, given by its witnesses.

6. The respondent called as a witness its superintendent of the water works, and, against the petitioner's objection and exception, was permitted to prove by him that in the spring of 1895 and subsequently to the conveyance from the petitioner to the defendant, he was sent by the Water Board of the city of Newburyport to make an arrangement with Jackman for the use by said city of the waters of Jackman Spring, and that he made a contract with Jackman for such use of said water, by which Jackman was to be paid by the city $1 for each and every day that the water was actually pumped by the city from said spring; and the city pumped water from the spring, under the contract, during this year, for some 126 days, — an average of 144,000 gallons per day.

At the argument before the commissioners, the petitioner asked them to adopt the following propositions:

1. The St. 1893, c. 471, entitled "An Act to supply the city of Newburyport with water," never took effect, because the city had failed and refused to pass the vote to purchase the property of the Newburyport Water Company, as provided for in § 12. (It was admitted that under that act the city duly passed a vote, on August 25, 1893, refusing to purchase the corporate property of the Newburyport Water Company, and that on September 7, 1893, it duly passed a vote to accept said act of 1893. It was claimed by the respondent that the city of Newburyport, by virtue of and upon such vote of acceptance, was thereupon authorized to establish and maintain a system of water supply under and according to said act of 1893.)

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2. The city of Newburyport acquired from the Newburyport Water Company all the incorporeal as well as the corporeal property of said company, including therein all the rights, franchises, easements, and privileges of every description belonging to the company.

3. By St. 1894, c. 474, the Water Company was authorized to sell, and the city was bound to buy: (1) all the rights; (2) all the privileges; (3) all the easements; (4) all the lands; (5) all the water; (6) all the water rights; and (7) all the structures, pipes, machinery, and other personal property used in supplying the city and its inhabitants with water. That such construction should be given to the statute as that every one of these words should have its full force and meaning; that none of them should be treated as vague and meaningless words; but assuming that they were put into the statute as meaning something, if possible, such construction should be given to the statute as should give force and meaning to every one of these words in connection with the other words of the statute.

4. The term "rights and privileges" in St. 1894, c. 474, § 1, included the right of the company to distribute water and collect water rates; it did not mean or include the franchise of the company to be a corporation; and the term "franchise," as used in the last sentence of § 1, should be construed as meaning only the franchise to be a corporation, or the charter of the corporation.

5. The last sentence of said § 1 did not preclude the commissioners from considering either the past or future earning capacity of the Water Company in determining the value of the property for the purposes of its use by the city of Newburyport, and the past earning capacity of the company should properly be considered by the commissioners in determining the value of the corporate property for its use by the city; that the term "good will," used in the same sentence of § 1, meant such peculiar and additional value as might pertain to the property by reason of the fact that the city succeeded to the business as conducted by the Water Company.

6. The phrase "the fair value of said property for the purposes of its use by said city" entitled and required the commissioners to determine what could fairly be realized by the city from

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the property, and to award an amount which should represent the fair value of the property, including therein all the incorporeal rights, privileges, and franchises belonging to said company.

The commissioners in their report state concerning the same: "We may assume that in so far as the propositions contained in the first three clauses are concerned, they are correct, and the definition of 'good will' set forth in the fifth clause we accept. Our estimation of the value of the property, however, is based upon the theory that, whether or not the company vested everything in the city described in clause two, we still remain of the opinion that the elements of valuation which we have already herein stated are all that we can take into consideration in making our award, and we have therefore confined ourselves strictly to these elements of valuation, and do not include anything else."

The commissioners further held that they had the power to determine who should pay, and find, as a matter of fact, that the city ought to pay the costs of the reference, and, at the request of the respondent, reserved for the consideration of this court whether they had power in law so to determine.

Hearing before *Barker*, J., who, the petitioner having moved that the report be recommitted to the commissioners, reserved for the determination of the full court the questions whether the award should be recommitted and whether it should be accepted.

R. M. Morse, (*F. L. Evans* with him,) for the petitioner.

A. E. Pillsbury, (*C. C. Dame & R. E. Burke* with him,) for the respondent.

HOLMES, J. The price to be paid by the city of Newburyport to the Newburyport Water Company for what it purchases under St. 1894, c. 474, is not left to the discretion of the commissioners. A rule is given to them by the statute, and it is not improper that the manner in which that rule has been interpreted and carried out should be reported for the supervision of this court before the acceptance of their report. *Kingman, petitioner*, 153 Mass. 566, 579. We are not disposed to criticise even the reporting of questions of evidence by agreement of parties, so far as it may seem possible that they had a substantial bearing upon the result. But we should not recommit the report upon a matter of evidence unless we could see some probability of an

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appreciable change in the report upon the correction of the mistake.

The chief complaint of the petitioner is that no allowance is made for its right to lay and maintain pipes in the streets and its right to collect water rates. There was much discussion whether these are among the "rights" which the city buys under § 1 of the act, and, if so, whether they are embraced in the provision that the value of the property shall be estimated without enhancement on account of, among other things, the franchise of the company. As bearing upon this there was a good deal of argument as to whether St. 1893, c. 471, was in force, the city having voted not to purchase the petitioner's property as therein provided, but afterwards having voted to accept the act. We do not think it necessary to go into these considerations, or even to examine with great accuracy how far the rights in question have not been allowed for. The direction to "determine the fair value of said property for the purposes of its use by said city" is clear enough without going into controverted questions. Whatever the city purported to purchase, (see *Abbott* v. *New York & New England Railroad*, 145 Mass. 450, 453, *State* v. *Sherman*, 22 Ohio St. 411, 428, and *Coe* v. *Columbus, Piqua, & Indiana Railroad*, 10 Ohio St. 372, 387,) the petitioner's right to lay pipes in the streets was of no use to the city. The city had that right by virtue of the legislative authority to furnish water. Water pipes are not an additional burden to the highway. *Pierce* v. *Drew*, 136 Mass. 75, 81. *Lincoln* v. *Commonwealth*, 164 Mass. 1, 10. And as soon as the city was authorized by the Legislature to furnish water no one could complain if it proceeded to lay pipes for that purpose. Assuming that the act of 1893 was not in force, and admitting that a purchase from the petitioner was a condition precedent to the exercise of any rights under the act of 1894, still it is plain that, when once the purchase was made, the act of 1894 conferred upon the city directly, and not merely or at all as successor to the Water Company, the right to supply itself and its inhabitants with water, as if under the act of 1893 in case the Water Company had not offered to sell under that act. A similar answer may be made with regard to the right to charge water rates. St. 1894, c. 474, §§ 2, 4. St. 1893, c. 471, §§ 1–3, 8, 13. "It is the statute, and not the company which originally

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constructed the [water works], which confers upon the local authority this right." *Edinburgh Street Tramways Co.* v. *Edinburgh*, [1894] A. C. 456, 464, 465.

It must be remembered that the transaction before us springs out of a voluntary offer by the petitioner to sell upon the statutory terms, and therefore there is no reason to try to bend those terms in its favor. Of course, an offer by a water company made under the threat of municipal competition and to avoid ruin, might be voluntary only in name. But we have no reason to assume in this case that the petitioner is the victim of robbery, and must treat it as having acted of its free choice in fact as well as in form.

The other objection most insisted upon by the petitioner is the exclusion of evidence of its net earnings in the past. Had the evidence been admitted, it is improbable that we should have recommitted the report on that ground. We are not disposed to recommit it because the evidence was excluded. The net income no doubt would be an indirect way of getting at the value of the capital in a transaction between individuals. It is not necessary to say that it would throw no light on the different question which the commissioners had to answer under the statute. But the question was a different one. Their duty was to find the fair value of the property for the purposes of its use by the city, and they were to find it "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." It is doubtful whether the evidence would not be held inadmissible in England as an attempt to get an allowance for "future earning capacity," although the way in which these words are used in St. 1891, c. 370, § 12, points to a narrow construction of them in the act before us. *Edinburgh Street Tramways Co.* v. *Edinburgh*, [1894] A. C. 456, 466. In this country it has been said that basing the value upon earnings is in effect valuing a franchise which no longer exists. *National Waterworks Co.* v. *Kansas City*, 62 Fed. Rep. 853, 864. Even in an ordinary transaction the test would not be past profits, but market value, if that could be ascertained. *Montgomery County* v. *Schuylkill Bridge Co.* 110 Penn. St. 54, 60. *In re Kensington & Oxford Turnpike Co.* 97 Penn. St. 260. *Stockton & Copperopolis Railroad* v. *Galgiani*, 49 Cal. 139.

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Compare "fair market value for the purposes of its use." St. 1891, c. 370, § 12. At all events, the different conditions under which the property would be used by a municipal corporation seeking only reimbursement, not profit, so diminish the instructiveness of the figures offered that, even if admissible, we think that they ought not to have affected the result.

The commissioners state the elements of valuation which they have taken into account. In addition to the value of the tangible property and easements, they have allowed forty thousand dollars for the fact that the plant was a going concern and in full operation. They have allowed for everything for which the petitioner was entitled to be paid. They have approached the question in a manner in which it was within their discretion to approach it. *National Waterworks Co.* v. *Kansas City*, 62 Fed. Rep. 853. If capitalizing profits would give a much greater excess over the value of the land, water easements, and plant of the company than the commissioners allowed, the reasons are to be found in the franchise and monopoly of the company, in its right to lay pipes in the streets, and partly perhaps in the personal skill of the management, none of which are things for which the city is to pay.

The officer who made the tax returns setting forth the value of the stock of the company was called by the petitioner, and testified to the value of the company's property. On cross-examination the respondent was allowed to identify the tax returns made by him and to put them in. The returns had some tendency to show a smaller value of the property than that given on the stand by the witness, and so to contradict him, and were admissible on that ground, even if they did not amount to admissions by the corporation itself.

It appears to us questionable at least whether evidence that insurance rates were higher than the standard rates, and were advanced because of defects in the water system, would be admissible before a jury upon a question of value. Yet as an actual price paid in the market because of a specific fact, the objection to it is, not that it is *res inter alios*, but rather that it is too remote from the question at issue to give much help. See *Call* v. *Allen*, 1 Allen, 137, 144. We do not see how it could do any harm beyond tending to prove that the waterworks were

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not as good as the average, a fact which, if proved, hardly could affect a valuation arrived at as the commissioners arrived at it.

We are not prepared to say that the price of Norman's stock was inadmissible. But it gave a value for the total property so far away from the award that it is not necessary to discuss the question, since it was not adopted as a standard.

The evidence of the sum paid Jackman by the city for the use of his spring, as bearing on the value of the water, does not appear to have been open to the objection that his acceptance of it practically was compulsory, as in *Cobb* v. *Boston*, 112 Mass. 181, and *Sawyer* v. *Boston*, 144 Mass. 470. It seems not to have been very different from the price paid by the petitioner.

It was within the commissioners' power to award costs. *Jones* v. *Carter*, 8 Allen, 431. *McLaughlin* v. *Old Colony Railroad*, 166 Mass. 260. *Commissioners' award accepted.*

JAMES DOBBINS *vs.* WEST END STREET RAILWAY COMPANY.

Middlesex. March 23, 1897. — June 14, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Street Railway — Personal Injuries — Notice — Statute.

A street railway is entitled to the notice required by Pub. Sts. c. 52, § 19, to be given to the "county, town, place, or persons by law obliged to keep said highway . . . in repair," as a condition precedent to the right to sue it given by § 18, for injuries caused by a defect in the highway between the railway tracks due to its neglect of its obligation to repair, imposed by Pub. Sts. c. 113, § 32.

TORT, for personal injuries occasioned to the plaintiff by the neglect of the defendant to keep a certain highway in repair, whereby the plaintiff, travelling thereon, was hurt. There was no allegation in the declaration, nor was there any proof at the trial, that notice of the time, place, and cause of the injury was given to the defendant within thirty days from the time the injury was received.

Trial in the Superior Court, before *Mason*, C. J., who, at the

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close of the evidence for the plaintiff, directed a verdict for the defendant; and the plaintiff alleged exceptions.

S. H. Tyng, for the plaintiff.

P. H. Cooney, (*L. F. Hyde* with him,) for the defendant.

HOLMES, J. This is an action against a street railway company for injuries caused by a defect in the highway between the railway tracks, which was due to the defendant's neglect of its obligation to repair, imposed by Pub. Sts. c. 113, § 32. The question is whether the defendant was entitled to the notice required by Pub. Sts. c. 52, § 19, to be given to the "county, town, place, or persons by law obliged to keep said highway . . . in repair," as a condition to the right to sue it given by § 18.

The difficulty is here. The obligation to repair the highway at the point where the accident happened is created by the beginning of Pub. Sts. c. 113, § 32. The liability to persons injured by a neglect of the duty may be derived either from the same section, or from Pub. Sts. c. 52, § 18. The former, dealing with other liabilities as well, has no requirement of notice. The latter, dealing only with the liability for a defect in the highway, has attached to it a requirement of notice in terms which cover all cases. But Pub. Sts. c. 52, §§ 18, 19, correspond to St. 1877, c. 234, §§ 2, 3, which were passed to amend the law as to liability for defects in highways, and have been declared in pretty broad terms not to affect the act of 1871, (c. 381, § 21,) from which § 32 of Pub. Sts. c. 113, is derived. *Brookhouse* v. *Union Railway*, 132 Mass. 178, 180.

We regard the present question as left open by the last part of the decision cited. There is no reason for applying a peculiar rule to street railways. The provisions of Pub. Sts. c. 113, § 32, deal in one sentence with liabilities for defects in the highway, and for other things as to which no notice would be required. The declaration considered in *Brookhouse* v. *Union Railway* was as broad as the statute. But when it appears that the cause of action is a defect in the highway, we are of opinion that the words of Pub. Sts. c. 52, § 19, should be given their natural construction and effect, and should not be narrowed artificially in order to create an abnormal exception. See *Dickie* v. *Boston & Albany Railroad*, 131 Mass. 516; *Mack* v. *Boston & Albany Railroad*, 164 Mass. 393.

Exceptions overruled.

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ADDISON W. ANDREWS *vs.* CONSTANCE S. KEITH.

Norfolk. March 24, 1897. — June 14, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract — Board of Horse — Bailment.

At the trial of an action of contract to recover for the board of a horse, it appeared that the defendant left the horse at the plaintiff's stable to be boarded at a certain rate per week, without further agreement or explanation, and later attempted to stop his liability by a simple announcement to that effect, coupled with a refusal to take back the horse. The judge ruled that the plaintiff could recover nothing for the keep of the horse after he was notified that the defendant refused to pay; and the amount to be paid in case the ruling was wrong was agreed upon. *Held*, that the ruling was wrong, and that the plaintiff was entitled to recover the amount agreed upon.

CONTRACT, for boarding a horse. Trial in the Superior Court, before *Richardson*, J., who reported the case for the determination of this court in substance as follows.

The plaintiff offered evidence tending to show that the defendant, having the rightful possession of the horse, left it on July 23, 1895, in the plaintiff's stable under an agreement previously made by the defendant, and her promise to pay the plaintiff for its board at the rate of $4.50 per week; that no time for boarding or paying for it was mentioned; and that he was not then told by the defendant or any one for her, that the defendant was not the owner of the horse. The defendant offered evidence tending to show that she did not promise to pay for the board of the horse, but that, when the horse was taken to the plaintiff's stable by her agent, she by the agent informed the plaintiff that she did not own the horse, though she had had the possession and use of it; that it was the property of one De Bussigny, and that if the plaintiff took it to board or keep he must look to the owner for his pay therefor, or rely upon the horse itself as security therefor; and that he took it to board on this understanding and condition.

About one week after the horse was left at his stable, the plaintiff received a letter from the defendant as follows: "I write this to let you know I sha'n't be responsible for the board

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of the horse that I sent there. C. S. Keith." The defendant did not remove or offer to remove the horse from the plaintiff's stable. Thereupon the plaintiff took the horse to the defendant, and the defendant refused to accept it or to have it left on her premises. The plaintiff returned the horse to his stable, and continued to charge the defendant with board at the price the plaintiff contended had been agreed upon. The plaintiff did not inform her that he was still charging the board of the horse to her, nor did she make inquiry.

The judge submitted the case to the jury, upon the question whether the defendant had agreed to pay for the board of the horse at all, at the time of or before the horse was taken to the plaintiff's stable, stating that if they found for the plaintiff on this issue, they should find for the amount which became due to him at the time when he received the letter, which was conceded to be one week after the horse first came to the stable, but that the plaintiff would not be entitled to recover for the board of the horse after he received the letter. To this instruction the plaintiff excepted.

The jury rendered a verdict for the plaintiff for $4.50. If the ruling was right, judgment was to be entered on the verdict, but if the receipt of the letter stating that the defendant would not pay for the board did not terminate her liability, judgment was to be entered for the plaintiff for $130.50.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

A. C. Lowell, for the defendant.

J. Everett, for the plaintiff.

HOLMES, J. We must assume that the defendant left the horse to be boarded at the plaintiff's stable at a certain rate per week, and without further agreement or explanation. On that state of facts, of course she could stop her liability at any time, but it does not follow that she could do so as she attempted to do by a simple announcement to that effect, coupled with a refusal to take back the horse. Suppose that she had been the owner of the horse, which, for the decision of the case, we must assume that she may have been, although it seems likely that she was not; and, to make the case simpler, suppose that the bailment had been only for custody, it is clear that if she had wanted to

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stop her liability she would have had to do her half towards ending the bailment. She could not have refused to take the horse from the plaintiff's hands, and yet have repudiated liability for the custody accepted at her request. It would not have been an answer to this action to say that the plaintiff might have turned the horse into the street, or tried to find a pound. *Preston* v. *Neale*, 12 Gray, 222. When the object of the bailment is a living thing, which must be fed, the right to recover the necessary expenses of preserving the object follows the right to recover for keeping it. *Preston* v. *Neale*, *ubi supra*. See *Harter* v. *Blanchard*, 64 Barb. 617; *Handford* v. *Palmer*, 5 Moore, 74, 79.

When nothing is said about the title, it does not matter whether the bailor owns or only has possession of the thing. The principle is the converse of that stated in *Stiff* v. *Keith*, 143 Mass. 224, 225. If the bailee wishes to end his responsibility under a bailment terminable at will, he must restore the possession to the person whom, by accepting the bailment, he admitted to be entitled to it. So if a bailor wishes to do the same thing, he must accept the possession which, by making the bailment, he has affirmed properly to belong to him.

It does not necessarily follow from our decision that, in a case like the present, the plaintiff could have kept silent after the defendant's refusal to receive the horse, and have charged her for more than a reasonable time without taking any further steps. There is no such question before us. The amount to be paid in case the judge's ruling was wrong is agreed upon. The judge ruled that the plaintiff could recover nothing for the keep of the horse after he was notified that the defendant refused to pay. This, in our opinion, was wrong. See *Dale* v. *Brinckerhoff*, 7 Daly, 45, 46.

Judgment for the plaintiff for $130.50.

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CELIA ROSENBERG *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. March 26, 1897. — June 14, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries occasioned to Minor — Negligence — Due Care.

At the trial of an action against a street railway company for personal injuries sustained by the plaintiff in consequence of being run over by one of the defendant's cars, evidence that the car was moving very rapidly through a much frequented street of a city; that the gong was not sounded; that the plaintiff, who was nearly nine years of age, with a companion who was of about the same age, before starting to cross the street looked both ways to see if a car was approaching, and, seeing none, was crossing the street slowly when the defendant's car came upon, struck, and ran over her, is competent to be considered by the jury on the question of due care of the plaintiff and negligence on the part of the defendant.

TORT, for personal injuries occasioned to the plaintiff, a minor, nearly nine years of age, on June 4, 1893, in consequence of being run over by an electric car of the defendant on Washington Street, in the city of Boston.

At the trial in the Superior Court, before *Richardson*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The material facts appear in the opinion.

M. F. Dickinson, Jr. & H. R. Bailey, for the defendant.

C. W. Bartlett, (*C. A. Reed & R. Levi* with him,) for the plaintiff.

ALLEN, J. There was evidence tending to show that the car was moving very fast, some ten or eleven miles an hour, through a much frequented street in the city of Boston; that the gong was not sounded; that the plaintiff and her companion, who was another child of about her own age, before starting to cross the street, looked both ways to see if a car was coming, and saw nothing; that the plaintiff was crossing slowly; and that the car came upon her and struck her and ran over her. The evidence upon these points was conflicting; but if the plaintiff's evidence was believed by the jury, it was competent for them to find that she was in the exercise of due care, and that the defendant's motorman was negligent. *Exceptions overruled.*

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ATTORNEY GENERAL *vs.* NATHANIEL DOLE & another.

Essex. May 21, 1897. — June 14, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Enlargement of Number of Selectmen at Adjourned Town Meeting.

A town may, at an adjourned annual town meeting, reconsider a vote passed on the first day of the meeting fixing the number of selectmen, and may then vote to enlarge the number and elect additional selectmen in pursuance of such vote.

INFORMATION in the nature of *quo warranto*, filed April 12, 1897, for the purpose of trying the title by which the defendants claim to have been elected to the office of selectmen of the town of Newbury.

The case was heard by *Barker*, J., who dismissed the information, and reported the case for the consideration of the full court. The material facts appear in the opinion.

B. B. Jones & M. A. Pingree, for the plaintiff.

H. P. Moulton & N. N. Jones, for the defendants.

KNOWLTON, J. At the annual meeting of the inhabitants of Newbury held on March 2, 1897, it was within the power of the town to choose three, five, seven, or nine selectmen. St. 1893, c. 417, § 266. The vote under article fifth of the warrant, "To proceed to choose three selectmen, all on one ballot," was a determination by the town that the number should be three. *Commonwealth* v. *Wentworth*, 145 Mass. 50. It was within the power of the town to reconsider this vote, and to make the number larger at any time before the meeting was dissolved. The adjourned meeting held on March 16 was a continuation of the same meeting, and the town had on that date the same right to reconsider a vote passed on March 2 as it had on the first day of the meeting. *Attorney General* v. *Simonds*, 111 Mass. 256, 259. *Reed* v. *Acton*, 117 Mass. 384. The only limitation of this right was that the reconsideration could not affect rights acquired in the mean time by action under the vote. *Hunneman* v. *Grafton*, 10 Met. 454. *Parker* v. *Titcomb*, 82 Maine, 180. The town had acted under the vote by duly electing three persons selectmen.

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No reconsideration could be voted that would deprive these persons of the rights and emoluments which belonged to their official place, but a vote fixing the number might be reconsidered with a view to make the number larger. Indeed, the number could not otherwise be affected by the reconsideration, for the statute requires that the board shall consist of three at least.

This being the situation at the adjourned meeting on March 16, it was voted to take up article five of the warrant, and it was then voted to add two to the number of selectmen, and thereupon a ballot was taken resulting in the election of the defendants. While the vote to add two to the board was not upon a formal motion to reconsider the vote fixing the number, it was in substance a vote to reconsider. It was a vote upon a question which might have been divided and acted upon in two parts, as it involved a determination, first, to reconsider the former vote, and, secondly, to make the number larger; but the fact that it was informal is not material, inasmuch as it was correct in substance, and no question was raised in regard to its form. We are of opinion that the proceedings were warranted in law, and that the defendants were duly elected.

We do not mean to intimate that, after the election of a board of selectmen at the annual meeting, a town can, at a special meeting subsequently called, change the number of the board fixed at the annual meeting. See *People's Ins. Co.* v. *Westcott*, 14 Gray, 440; *Mason* v. *Brookfield School District*, 20 Vt. 487, 493. But we see no serious objection, either on principle or in practice, to allowing a town at the adjourned annual meeting, after choosing three selectmen, to consider further the article of the original warrant under which was determined the number to be chosen.

Information dismissed.

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FOSTER D. EDWARDS *vs.* WARREN LINOLINE AND GASOLINE WORKS & trustee.

Suffolk. November 20, 1896. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trustee Process — Principal Defendant — Joint Stock Company — Partnership.

A partnership association formed under the laws of Pennsylvania contained in Brightly's Purdon's Digest, (12th ed.) 1086–1088, is not a corporation, and cannot be sued here as such.

TRUSTEE PROCESS. The principal defendant was described in the writ as "a joint stock company organized under the laws of Pennsylvania." The trustee, which was a Massachusetts corporation, filed an answer setting forth reasons why it should not be charged, and to interrogatories propounded by the plaintiff, made answers, the nature of which appears in the opinion. The trustee moved that it be discharged. The Superior Court allowed the motion, discharged the trustee with costs, and dismissed the action; and the plaintiff appealed to this court.

The case was argued at the bar in November, 1896, and afterwards was submitted on briefs to all the justices.

R. B. Kendall, for the plaintiff.

B. G. Davis, for the trustee.

LATHROP, J. It is conceded by the plaintiff, that, as the jurisdiction of the court depends upon charging the Walworth Manufacturing Company as trustee, inasmuch as there was no service upon the principal defendant, the action was properly dismissed upon discharging the trustee.

The question then is whether the trustee was properly discharged, and this depends upon whether the principal defendant, an association formed under the laws of the State of Pennsylvania, is a partnership or a corporation.

The trustee's answers to interrogatories refer to Brightly's Purdon's Digest, (12th ed.) 1086–1088, and to the cases of *Eliot* v. *Himrod*, 108 Penn. St. 569, and *Sheble* v. *Strong*, 128 Penn. St. 315, as containing the law relative to the statement in the

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answer, that the principal defendant was a partnership, and not a corporation.

From the Digest it appears that such an association is styled a "partnership association," and not a corporation. By the terms of the various acts which have been passed upon the subject, such an association may be formed by three or more persons. The capital is alone to be liable for the debts. There is no personal liability of the members, except to the extent of any unpaid subscription, if certain provisions of the act are complied with. "Interests in such partnership associations" are declared to be personal estate, and are transferable, under such rules and regulations as shall from time to time be prescribed; but if there are no such rules and regulations, the transferee of any interest in any such association is not entitled to any participation in the subsequent business of the association, unless elected to membership therein by a vote of a majority of the members in number and value of their interests. The business is to be conducted by a board of managers. The duration of the association may be fixed by the articles of association, but is not to exceed twenty years.

Power to adopt and use a common seal is given in case the association has occasion to execute a deed of conveyance or bonds and mortgages. Land sold to the association, or by it, is required to be conveyed in the name of the association. It is further provided: "Said association shall sue and be sued in their association name; and when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof; which service shall be as complete and effective as if made upon each and every member of such association."

In *Eliot* v. *Himrod*, 108 Penn. St. 569, 580, it is said by Mr. Justice Trunkey, in delivering the opinion of the court: "The formation of a limited partnership association is materially different from the creation of a corporation. Such association is treated in the statute as a partnership which, upon the performance of certain acts, shall possess specified rights and immunities. In contemplation that the association may consist of many members, for convenience it is clothed with many of the features and powers of a corporation, such as the right to sue

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and be sued, grant and receive, in the association name. But no man can purchase the interest of a member and participate in the subsequent business, unless by a vote of a majority of the members in number and value of their interests. No charter is granted to the persons who record their statement." *Sheble* v. *Strong*, 128 Penn. St. 315, 318, is to the same effect.

If the question presented were an open one in this Commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one.

At common law, a joint stock company formed for business purposes is considered in this Commonwealth merely as a partnership. *Tappan* v. *Bailey*, 4 Met. 529. *Tyrrell* v. *Washburn*, 6 Allen, 466.

The same rule has been applied to joint stock associations formed under the laws of the State of New York, which do not differ, in any essential respect, from the laws of Pennsylvania. *Taft* v. *Ward*, 106 Mass. 518, and 111 Mass. 518. *Bodwell* v. *Eastman*, 106 Mass. 525, 526. *Gott* v. *Dinsmore*, 111 Mass. 45, 51. *Boston & Albany Railroad* v. *Pearson*, 128 Mass. 445. See also *Frost* v. *Walker*, 60 Maine, 468; *Dinsmore* v. *Philadelphia & Reading Railroad*, 32 Leg. Int. 388, and 11 Phila. 483.

In *Taft* v. *Ward*, 106 Mass. 518, 524, speaking of the New York statutes, it was said by Chief Justice Chapman:

"These statutes provide, in substance, that any association, consisting of seven or more shareholders or associates, may sue and be sued in the name of the president or treasurer; that in such suit a judgment may be rendered against the company; and until an execution is issued against the company, and returned unsatisfied, no action shall be maintained against individuals. These statutes seem to apply to all copartnerships consisting of seven or more members. The members of such companies are authorized to hold their interests in shares, which are assignable like shares of stock in a corporation, and the action against the members is regarded as supplementary to the action against the company. *Waterbury* v. *Merchants' Union Express Co.* 50 Barb. 157. *Robbins* v. *Wells*, 1 Robertson, 666.

"So far as these statutes relate to the procedure in courts for the recovery of debts, they are limited to the State of New York;

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for each State adopts its own forms of remedy. Story, Confl. Laws, §§ 556–558. The plaintiff could not in this Commonwealth bring an action against the president or secretary, and obtain a judgment against the company by its name; nor could he bring an action against the members, or any of them, as a supplement to such an action. In order to do so, we must hold that the statutes of New York prescribing forms of action are in force here. In this Commonwealth, such a company is a mere copartnership."

There is nothing inconsistent with an association being a partnership that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution of the partnership. *Phillips* v. *Blatchford*, 137 Mass. 510. See also *Hoadley* v. *County Commissioners*, 105 Mass. 519; *Gleason* v. *McKay*, 134 Mass. 419.

The case mostly relied upon by the plaintiff is *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566, which was taken to the Supreme Court of the United States on a writ of error from this court. See *Oliver* v. *Liverpool & London Ins. Co.* 100 Mass. 531. It was a bill in equity, filed by the Treasurer of the Commonwealth under the St. of 1862, c. 224, § 11, to restrain the defendant from prosecuting its business until the tax assessed upon it by § 2 of the statute had been paid. This section provided that "each fire, marine, and fire and marine insurance company incorporated or associated under the laws of any government or State other than one of the United States," should annually pay a certain tax. The defendant was an English company formed for the business of insurance, and organized under a deed of settlement. Its property was divided into transferable shares. It had power to sue and be sued by the name of its chairman, and a suit did not abate by reason of the death of such officer. The company could sue its own members, and be sued by them. Execution on any judgment recovered against the company could be issued against any proprietor. The statute under which it was formed and subsequent statutes declared that it should not be deemed to be incorporated. The company was composed in part of British subjects and in part of citizens of the State of New York.

This court, after stating that it was not a pure corporation nor a pure partnership, but was an association intermediate

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between corporations known to the common law and ordinary partnerships, and was so far clothed with corporate powers that it might be treated, for the purposes of taxation, as an artificial body, proceeded to say: "We think the defendants are an association of the kind to which the statute of 1862 was expressly intended to apply, as well as to bodies wholly corporate in their character; and that, being permitted by the comity of our laws to exercise their functions within this Commonwealth, they can claim no exemption from regulations appropriate to their collective action on account of the citizenship or nationality of their individual members."

In the Supreme Court of the United States, the decree of this court was affirmed, on the ground that the company was a foreign corporation; but Mr. Justice Bradley, while agreeing in the result, differed on the question whether the company was a corporation. He was of opinion that it was one of those special partnerships called joint stock companies, and that it could not sue or be sued in this country without legislative aid.

This view of Mr. Justice Bradley is in accord with the view of this court, and we are not aware that the view taken by the Supreme Court of the United States has been followed in this Commonwealth. The decisions which we have already cited show that a foreign joint stock company is considered as an association or partnership, and not as a corporation.

An examination of the statutes further shows that the Legislature has clearly recognized the distinction between foreign corporations and associations; and that where it has deemed it best that an act should apply to an association as well as to a corporation, it has said so in plain language. Thus the St. of 1882, c. 106, relating to the taxation of foreign mining, quarrying, and oil companies, and requiring the appointment of an agent here upon whom process may be served, uses the language, "every corporation, company, or association."

The St. of 1887, c. 214, in § 1 provides: "When consistent with the context, and not obviously used in a different sense, the term 'company' or 'insurance company' as used herein includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance." The language is the same in the St. of 1894, c. 522, § 1.

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By the St. of 1888, c. 429, § 11, "fraternal beneficiary corporations, associations, or societies," organized under the laws of another State and then doing business here, were allowed to continue business without incorporation under the act. But by the St. of 1892, c. 40, § 1, this was amended by striking out the words "associations or societies."

The St. of 1884, c. 330, requires "Every corporation established under the laws of any other State or foreign country," and hereafter having a usual place of business here, before doing business, to appoint in writing the commissioner of corporations, or his successor in office, to be its true and lawful attorney, upon whom process might be served.

The St. of 1888, c. 321, allows "Manufacturing corporations established under the laws of other States," which have complied with the provisions of the St. of 1884, c. 330, to purchase and hold such real estate here as may be necessary for conducting their business.

By the St. of 1895, c. 311, "Foreign corporations engaged in the business of selling or negotiating bonds, mortgages, notes, or other choses in action," are made subject to the provisions of the St. of 1884, c. 330.

The St. of 1896, c. 391, § 1, contains a provision relating to the personal liability, under certain circumstances, of "the officers and members or stockholders in any corporation established under the laws of any other State or foreign country." See also St. 1895, c. 157.

Many other instances of legislation might be given where the distinction between a corporation proper and a mere association or organization is shown to be clearly in mind.

Unless the principal defendant can be considered a corporation, it cannot be sued here under the name which the laws of Pennsylvania authorize it to use. Such laws have no extra-territorial force or effect. The trustee, therefore, was properly discharged.

In the opinion of a majority of the court, the order discharging the trustee and dismissing the action must be

Affirmed.

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ERASTUS F. HOLDEN & another *vs.* PHŒNIX RATTAN COMPANY.

SAME *vs.* SAME.

Middlesex. January 18, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Promissory Note — Exclusion of Defence of Maker of Note in Action thereon by Indorsee for Value before Maturity without Notice.

The maker of a promissory note cannot, as against an indorsee before maturity, for value, and without knowledge or notice of any defence thereto by the maker, recoup the damages by him sustained in consequence of a breach of warranty by the payee in the sale of merchandise to the maker in payment for which the note was given.

In an action by an indorsee against the maker of a promissory note, upon which there has been a want or failure of consideration in whole or in part, the production of the note by the indorsee and the proof or admission of the genuineness of the signatures make out a *prima facie* case in his favor, which is not met merely by proof of a want or a failure of consideration, but the burden of also introducing evidence that the indorsee did not take the note in good faith for value before maturity is on the defendant.

TWO ACTIONS OF CONTRACT. The first action was brought on four negotiable promissory notes, and the second on two such notes.

Trial in the Superior Court before *Blodgett*, J., who directed the jury to return a verdict for the plaintiffs; and the defendant alleged exceptions. The material facts appear in the opinion.

W. C. Wait, for the defendant.

G. A. King, for the plaintiffs.

FIELD, C. J. The actions are brought by an indorsee against the maker of the notes. All of the notes were payable on time to the order of Charles A. Lux, and were by him indorsed to the plaintiffs, and it seems to have been admitted that the signatures of the maker and indorser were genuine. In addition to the notes themselves as evidence, there was evidence that they had been taken by the plaintiffs before maturity, for value, without knowledge or notice that the maker had any defence to the notes as against the payee, and there was no evidence to the contrary. The plaintiffs are described in the writs as of Syra-

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cuse in the State of New York, and the defendant as a corporation having its usual place of business at Concord in this Commonwealth. The notes are all dated at Concord, and are made payable at "Framingham Nat. Bank, So. Framingham, Mass." No contention was made at the trial that the law of Massachusetts did not govern the rights and liabilities of the parties. The defendant made several requests for instructions, which were refused, and the presiding justice ruled "that upon the evidence no defence was made out upon which the defendant was entitled to go to the jury, and directed the jury to find a verdict for the plaintiffs, and the jury so found." The defendant excepted.

The notes were given by the defendant to Lux, in renewal of other notes which had been given in payment for a quantity of chair flag, delivered by Lux to the defendant under a contract. The contract called for two hundred tons of best quality chair flag, "price to be ($35) thirty-five dollars per ton of (2,000 lbs.) two thousand lbs." There was evidence that the flag so delivered was not of the quality called for by the contract, and that the fair market value of the flag when delivered did not exceed twenty dollars per ton. The defendant undertook in these actions to recoup the damages sustained by it from the alleged breach of this contract by Lux. The consideration of the indorsement of the notes by Lux to the plaintiffs was a debt due from Lux to the plaintiffs for coal delivered to him by them. The defendant in this court contended that, as the plaintiffs took the notes in payment of an antecedent debt, they were not purchasers for value; but this contention is not the law of Massachusetts. *Ives* v. *Farmers' Bank*, 2 Allen, 236.

The substance of the remaining contentions of the defendant is, that, as there was evidence of a defence to the notes in whole or in part as against Lux by way of recoupment of the damages suffered from the breach of the contract, the burden was upon the plaintiffs as indorsee, if this defence is made out, to prove that they were *bona fide* holders of the notes, and that the notes were taken by them before maturity for value, and that therefore the presiding justice could not properly order a verdict for the plaintiffs.

The doctrine contended for by the defendant is undoubtedly

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the law generally in suits on promissory notes by an indorsee against the maker; but a distinction has been taken between the cases where a promissory note has been originally obtained by the payee from the maker by fraud, or has been fraudulently put in circulation by the payee, or was given upon an illegal consideration, and the cases where there has been only a want or failure of consideration, in whole or in part, as between the maker and payee. In the former class of cases the production of the note by the indorsee and the proof or admission of the genuineness of the signatures are not enough to make out a case for the plaintiff if the fraud or illegal consideration is proved, but the burden still remains on him to produce some additional evidence that he took the note in good faith for value before maturity; while in the latter class of cases the production of the note by the indorsee and the proof or admission of the genuineness of the signatures make out a *prima facie* case in his favor, which is not met merely by proof of a want or failure of consideration, but the burden of also introducing evidence that the indorsee did not take the note in good faith for value before maturity is on the defendant. *Noxon* v. *De Wolf*, 10 Gray, 343. *Emerson* v. *Burns*, 114 Mass. 348. *Merchants' National Bank* v. *Haverhill Iron Works*, 159 Mass. 158. *National Revere Bank* v. *Morse*, 163 Mass. 383. *Conant* v. *Johnston*, 165 Mass. 450. See *Collins* v. *Gilbert*, 94 U. S. 753; *New Orleans Canal & Banking Co.* v. *Montgomery*, 95 U. S. 16; 2 Greenl. Ev. § 172; Taylor, Ev. (Chamberlayne's ed.) §§ 368, 369, p. 276[12]; Rice, Ev. § 84; 1 Danl. Neg. Instr. §§ 814, 815.

Without considering whether a recoupment of damages for breach of warranty in the sale of merchandise ever would be allowed in a suit brought by an indorsee of only a part of the notes given for the merchandise sold against the maker of the notes, while the remainder of the notes were outstanding and unpaid in the hands of other persons, the uncontradicted evidence for the plaintiffs in each of the present actions made out a *prima facie* case, and there was no evidence that the plaintiffs did not take the notes in good faith for value before maturity, and the presiding justice rightly ordered in each action a verdict for the plaintiffs.

Exceptions overruled.

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SIMON J. O'HERRON *vs.* WILLIAM GRAY & others.
NORA L. O'HERRON *vs.* SAME.

Suffolk. January 28, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Remedy of Owner of Stock against One to whom it has been Pledged by Another by whom it has been Embezzled — Guardian and Ward — Estoppel.

A guardian deposited a certificate of stock owned by and standing in the name of his ward in a bank for safe keeping, and subsequently borrowed money from the bank for his personal use, for which he gave his note and indorsed his ward's certificate in blank "A., by B., Guardian," and deposited it as collateral security for the payment of his note. The note was afterward paid by the guardian, but before its payment, C., the cashier of the bank, fraudulently pledged the certificate as security for his personal debt to D., who took it without notice of C.'s want of authority to pledge it, and supposing him to be in rightful possession thereof. D. then took the certificate to the office of the company issuing it, and asked for a transfer of the stock and for a certificate thereof in his own name, and upon the refusal of the company to make the transfer without the authority of the Probate Court, C., at the request of D., on a petition signed "B., Guardian, by C.," of which neither the guardian nor ward had any knowledge, by publication or otherwise, procured such a decree, and the stock was transferred and a new certificate thereof issued to D. *Held*, that the ward was entitled to a decree against D. for the transfer and delivery of the certificate of stock, and the payment of all the dividends received thereon by D., and, since there was no privity between the bank and D., the fact that the bank was paying the expenses of the plaintiff's litigation is immaterial.

A certificate of stock, although indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, is not a negotiable security.

A ward who is the owner of a certificate of stock which his guardian has indorsed in blank and deposited for safe keeping in a bank, whence it is fraudulently abstracted by the cashier and pledged for his personal debt, is not estopped by the negligence of his guardian from reclaiming his certificate of stock from the person to whom it was pledged by the cashier of the bank.

TWO BILLS IN EQUITY, filed November 21, 1894, to compel the defendants to transfer and deliver to the plaintiffs certain certificates of the capital stock of the Boston and Albany Railroad Company.

The cases were heard in this court on an agreed statement of facts, the material portions of which appear in the opinion, and a decree was entered in favor of each plaintiff, requiring the defendants to transfer and deliver to them a certificate for thirty-

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one and twelve shares, respectively, of the capital stock of the Boston and Albany Railroad Company, and to pay to them the amount of the dividends received by the defendants upon such stock. The defendants, in each case, appealed.

The case was argued at the bar in January, 1897, and afterwards was submitted on briefs to all the justices.

H. S. Dewey, for the defendants.

R. Foster, for the plaintiffs.

KNOWLTON, J. Each of the plaintiffs is the owner of stock in the Boston and Albany Railroad Company, represented by certificates in the possession of Gray, Dewey, and Company, the defendants. The plaintiff in the first case owned two certificates, — one for nineteen shares, and one for twelve shares, — both of which passed into the hands of the defendants, and were surrendered by them in exchange for a new certificate for thirty-one shares, issued in their own names. The plaintiff in the second case is the owner of one certificate for twelve shares, which the defendants received, and which has not been surrendered. Both of the plaintiffs are minors, and their respective certificates were made in their own names. These certificates were deposited for safekeeping by their mother, who was their guardian, in the Pittsfield National Bank. While the certificates were in the bank, the guardian borrowed money from the bank for her personal use, for which she gave her notes, and at the same time signed upon the back of each of her son's certificates a blank form of transfer, with a signature as follows: "Simon John O'Herron, by Mrs. Catherine O'Herron, Guardian." In like manner on her daughter's certificate, she signed with the signature, "Nora L. O'Herron, by Mrs. Catherine O'Herron, Guardian," and left the certificates as collateral security for the payment of her notes. This transaction occurred on or about December 17, 1889. On or about December 20, 1889, the cashier of the bank, one Francis, who had access to the vault where these certificates were kept, took them, without authority from anybody, and delivered them to the defendants, as security for one of his personal debts. In May, 1890, the guardian paid her notes at the bank. Some time in the year 1891, the defendants took the two certificates standing in the name of Simon John O'Herron to the office of the Boston and Albany Railroad Company, and asked to transfer the stock, and have a new

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certificate issued in their own names. The corporation refused to permit a transfer of the stock or the issue of new certificates without a decree of the Probate Court authorizing the sale of the stock. Thereupon the defendants requested Francis to procure such a decree. He then had a petition prepared by the register of the Probate Court for the county of Berkshire, in the name of the guardian, praying for leave to sell and transfer the certificates, and he signed the petition as follows: "Catherine O'Herron, Guardian, by E. S. Francis." On this petition, on July 21, 1891, the Probate Court issued a decree in the usual form, authorizing the guardian to sell or transfer the whole or any part of the stock. All this was done without notice of the petition by publication or otherwise, either to the plaintiffs or to their guardian, and without the knowledge of either of them. The transfer of the stock was then made on the books of the Boston and Albany Railroad Company, and a new certificate for thirty-one shares issued to the defendants. Francis continued to act as cashier of the bank until his death by suicide, on or about July 27, 1893, when his fraudulent conduct was discovered, and his estate was found to be insolvent. He paid the dividends on the stock to the plaintiffs' guardian regularly as long as he lived. At the time of receiving the certificates the defendants supposed that Francis was rightfully in possession of them, and they had no notice of his want of authority to pledge them, except the form of the certificates and of the transfers. The question is whether the defendants acquired a good title to the stock as against the plaintiffs. It is not necessary to consider the original claim of the bank to the stock as security for the loans to the guardian, as the loans were paid. It is clear that the guardian had no right to pledge the stock, and we do not intimate that the bank acquired a valid title to it.

Francis, under whom the defendants derived their title, had no right to the certificates, but held them feloniously. They were the general property of the plaintiffs, and the special property of the bank, which had the possession of them as bailee. The act of Francis in taking them, and pledging them as his own, if not larceny at common law, was at least embezzlement, which by our statute is deemed to be larceny. Pub. Sts. c. 203, §§ 37, 41. A *bona fide* purchaser for value from one who has taken property in such a way, acquires no title to it. The only excep-

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tion to this rule is when the property consists of negotiable securities. *Heckle* v. *Lurvey*, 101 Mass. 344, 345. *Spooner* v. *Holmes*, 102 Mass. 503, 507. But certificates of stock, even when indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, are not negotiable securities. This is settled by the highest authority. *Shaw* v. *Spencer*, 100 Mass. 382, 388. *Shaw* v. *Railroad Co.* 101 U. S. 557, 565, 566. *Knox* v. *Eden Musee American Co.* 148 N. Y. 441. *Bangor Electric Light & Power Co.* v. *Robinson*, 52 Fed. Rep. 520. *London & County Banking Co.* v. *London & River Plate Bank*, 20 Q. B. D. 232. It is plain, therefore, that the defendants cannot maintain their claim on the ground that the nature of the property takes it out of the general rule that no title can be acquired from one who has no title.

It is contended that St. 1884, c. 229, is applicable to these cases. If we assume in favor of the defendants that this statute will protect a *bona fide* purchaser or pledgee for value, to whom a certificate of stock has been delivered with a written transfer of it, or a written power of attorney to sell, assign, or transfer it, signed by the owner, it does not help the defendants. The signature on the back of these certificates was not that of the owner, but of a guardian whose trust relation to the property was disclosed on the face of the papers. In their report on the revision of the statutes (1834), the commissioners say, in a note to chapter 79, § 22 (which is section 21 in the final enactment), that they have made the provision as to sales of property by guardians the same as that for trustees appointed under wills. The provision for trustees under wills is found in Rev. Sts. c. 69, § 11, in Gen. Sts. c. 100, § 14, and with certain broader provisions from more recent legislation in Pub. Sts. c. 141, § 20. The provision in regard to guardians is found in Gen. Sts. c. 109, § 22. As a part of the history of the legislation, see also St. 1817, c. 190, § 35, and St. 1820, c. 54, § 3. It is the duty of one purchasing property held by a trustee to ascertain whether the transaction appears to be within the trustee's authority. *Atkinson* v. *Atkinson*, 8 Allen, 15. *Shaw* v. *Spencer*, 100 Mass. 382. *Loring* v. *Salisbury Mills*, 125 Mass. 138. *Smith* v. *Burgess*, 133 Mass. 511. *Loring* v. *Brodie*, 134 Mass. 453. *Colonial Bank* v. *Cady*, 15 App. Cas. 267. *Duncan* v. *Jaudon*, 15 Wall. 165. The statute does not protect the purchaser in a case like the present.

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It is contended, further, that the plaintiffs are estopped from reclaiming their property by the negligence of their guardian in leaving their certificates at the bank, indorsed with her signature. The principle which the defendants invoke is not applicable to the facts. Negligence which will work an estoppel of this kind must be a proximate cause of the purchase or advancement of money by the holder of the property, and must enter into the transaction itself. *Swan* v. *North British Australasian Co.* 7 H. & N. 603; *S. C.* 2 H. & C. 175. *Colonial Bank* v. *Cady*, 15 App. Cas. 267, 282. *Baxendale* v. *Bennett*, 3 Q. B. D. 525, 530. *Picker* v. *London & County Banking Co.* 18 Q. B. D. 515. *Knox* v. *Eden Musee American Co.* 148 N. Y. 441. *Arnold* v. *Cheque Bank*, 1 C. P. D. 578, 587, 588. *Scholfield* v. *Londesborough*, [1895] 1 Q. B. 536; *S. C.* [1896] App. Cas. 514. *Telegraph Co.* v. *Davenport*, 97 U. S. 369. *Bangor Electric Light & Power Co.* v. *Robinson*, 52 Fed. Rep. 520. If the negligence is such as might be an appropriate foundation for an action at law to recover damages by one who advances his money, it may be availed of by way of estoppel, to avoid circuity of action. But the facts of this case fall short of showing such negligence. The guardian intrusted the certificates to a national bank of good reputation. Neither she nor anybody else had any reason to anticipate larceny or embezzlement of the property, and a fraudulent use of it, to deceive others, by a trusted officer of the bank. She had no reason to expect that, if the certificates were stolen, anybody would take them without inquiring whether, as trust property, they had been disposed of by the guardian for the benefit of her wards. The conduct of the guardian was not a cause, but a mere condition, of the defendants' advance of money upon the faith of the certificates. A criminal act of Francis intervened as the cause of the defendants' loss, and this the guardian had no reason to anticipate.

When the certificates of stock came into the hands of the defendants, they showed on their face that they had not been assigned or transferred by their owners, but only by one who stood in a relation of trust to the owners. The transfer had not been completed, and the stock still stood in the names of the plaintiffs on the books of the corporation. There was only a signature of the guardian upon each certificate, appended to a

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blank which contained nothing to show the nature of the transaction by which it came into the hands of Francis. There was nothing to indicate that the plaintiffs had received value for the stock. Francis, who presented the certificates, was using them solely for his personal benefit. On the face of the paper there was notice to the defendants that they were trust property while in the hands of the guardian. The defendants were put upon inquiry, and they had no right to receive them as a pledge for Francis's debt, without at least having information of facts which would warrant them in believing that the plaintiffs' interests had been protected in the transaction by which they came into the hands of Francis. Apparently they made no inquiry, but took them as they were, knowing that the plaintiffs were to receive nothing from the disposition which Francis then made of them. We are of opinion that there is no principle of estoppel that can be invoked in favor of the defendants to deprive the plaintiffs of their property.

The decree of the Probate Court does not give effect to the claim of the defendants. It was not made until long after the transfer to them. It purported to authorize a sale of the stock, and not a pledge of it, much less a pledge of it for the benefit of others than the plaintiffs. But, above all, the Probate Court acquired no jurisdiction of the case as against the plaintiffs. No case nor any proper party was ever before the court in regard to the sale of the stock. The unauthorized signature and appearance of Francis availed nothing as against the plaintiffs or their guardian. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87. *Scott* v. *McNeal*, 154 U. S. 34, 46.

The fact that the Pittsfield National Bank is paying the expenses of the plaintiffs' litigation is immaterial. The plaintiffs are proceeding in their own rights and on their own equities. They may elect to proceed to recover back their stock, even though they might have a different kind of remedy against the bank. There is nothing in law or in equity to forbid their acceptance of such aid in the litigation as the bank may, for its own interest, choose to render them. There is no privity between the bank and the defendants. The act of Francis by which the defendants obtained their possession was a wrong against the bank and the plaintiffs, as well as against the defendants.

Decree in each case affirmed.

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THEOPHILE DE LISLE *vs.* WILLIAM H. WARD.

Middlesex. March 3, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Negligence — Trial.

In an action for personal injuries received by the plaintiff, while in the defendant's employ, from the blow of a swinging log, which was being hoisted from the ground with a pile-driver, near which the plaintiff was at work, no exception lies to the refusal to allow his counsel, in his argument, to appeal to the common knowledge and experience of the jury concerning the use of a guy rope, and to argue that it was gross carelessness on the defendant's part not to use such a rope to steady the log at the time of the accident; the testimony of witnesses called by the plaintiff to prove that it was customary to use a guy rope under similar circumstances not having been admitted, because they failed to qualify as experts.

TORT, for personal injuries received by the plaintiff, while in the defendant's employ, from the blow of a swinging log. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

W. H. Bent, for the plaintiff.

J. C. Burke, for the defendant.

BARKER, J. The plaintiff was at work between two piles of logs upon the bank of an excavation in which stood a pile-driver, which was some forty feet high, the bottom of the excavation being fourteen or sixteen feet lower than the top of the bank. When there was occasion to use one of the logs, a rope, running over a pulley at the top of the pile-driver, was fastened to the butt of the log, and the log drawn from its place by winding the rope upon a drum. The butt of a log so drawn from one of the piles between which the plaintiff was at work struck the pile-driver, and the smaller end of the log swung around and broke the plaintiff's leg.

The only exception is to the refusal to allow the plaintiff's counsel to argue that it was negligence on the part of the defendant that no guy rope was used to steady the log.

In opening, the plaintiff's counsel said that he should show

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that it was customary to use a guy rope under circumstances like those existing when the accident happened; but when he called witnesses to show this, they failed to qualify as experts, and did not testify upon the subject; but it did appear from the evidence that sometimes, under some circumstances, a guy rope was used in hoisting logs with a pile-driver. At the close of the evidence the court asked the plaintiff's attorney upon what evidence of negligence on the part of the defendant the plaintiff relied, and the attorney stated that, among other things, he proposed to appeal to the common knowledge and experience of the jury concerning the use of a guy rope, and to argue that it was gross carelessness not to have used one at the time of the accident. The court refused to allow such an argument to be made, and the exception was to that refusal.

The plaintiff contends that the refusal was practically a ruling that the question whether it was negligence on the part of the defendant not to use a guy rope was not for the consideration of the jury. The case went to the jury only upon the question whether it was negligence on the part of the defendant's superintendent to give the order to hoist the log before the plaintiff got out of the way, and the jury found a verdict for the defendant.

If the necessity of using a guy rope in circumstances like those which existed at the time of the accident was a matter of common knowledge, or "presumed to be within the common experience of all men of common education moving in the ordinary walks of life," then the plaintiff from that common experience, as well as from his actual knowledge of the place and the work in which he was engaged, must have understood and appreciated the danger of being struck by a swinging log hoisted without being controlled by a guy rope, and he cannot impute the failure to use one to the defendant as an actionable fault, because he was himself careless in working exposed to the obvious risk, or because he accepted that risk. On the other hand, if the necessity for a guy rope was not a matter of common knowledge, the plaintiff could not be allowed to argue it to the jury, for the reason that the witnesses whom he called to testify that it was customary to use a guy rope under similar circumstances, having failed to qualify as experts, did not testify on that subject. The

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bill of exceptions does not show on what ground the ruling was put by the presiding judge, but in either view of the case it seems to have been right. *Exceptions overruled.*

HENRY H. PIKE *vs.* CITY OF WALTHAM.

Middlesex. March 3, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract — Assignment — Action.

If a contract for the construction of a bridge is entered into with a city, which has a bond with sureties for the due performance of the work, and if during the progress of the work the contractor assigns the contract without the consent of the city, and afterwards renounces all interest in it and refuses to go on with the work, the city has a right to decline to permit the assignee to continue the work.

CONTRACT, by Henry H. Pike, surviving partner of the firm of H. H. Pike and Son, for the benefit of Joshua Benshimol, to recover for work done and materials furnished in the construction of a bridge in the defendant city under a written contract. Trial in the Superior Court, without a jury, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff introduced in evidence the report of an auditor, to whom the case had been referred, and rested.

The auditor found and reported the following facts.

The written contract between the firm, then composed of Henry H. Pike and his son Henry E. Pike, and the defendant city was entered into on May 23, 1888, for the construction of a stone bridge at Prospect Street in Waltham by the Pikes, who were stone masons and contractors; and Joshua Benshimol and one Shea were their sureties thereon for the due performance of the work, which was to be completed by November 1 of that year, and for the price of $38,000.

With the contract were connected full printed and written specifications detailing the materials, quality, form, and mode of construction of the bridge, providing fully for the inspection and

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superintendence of the work on behalf of the city by the city engineer, John F. Moore, and an inspector, one Barton, under the general control of the street commissioners of the city, and that payment should be made monthly of eighty-five per cent of the amount of work done, to be estimated by the city engineer, and the balance in thirty days after the completion of the contract to the satisfaction of the street commissioners. There was also a proviso that the city could determine the contract on the insolvency of the contractors or discontinuance of work by them for ten days after notice from the street commissioners, who could then on behalf of the city relet the work at the contractors' risk and expense.

Benshimol, beside being surety on the contract, was a creditor of the Pikes, and also had furnished all the money to carry on the work, but had no other relation to their contract or interest therein before October, 1888. On October 5, 1888, by an accident at the bridge, Henry E. Pike was killed and Henry H. Pike severely injured, so as to be incapacitated from attending to the work. These facts were at once known to the city and its officials as well as to Benshimol, but no claim was made by either party to the contract to terminate it on this account; on the contrary, Benshimol, by advice of his counsel, kept on with the work under it, the mayor of the city assenting; but the payments for what should be done were to be through Pike. One Connelly was employed by Benshimol to do the necessary stone work, with the knowledge and assent of the city engineer, and under the inspection of Barton; and one Fifield was, at the suggestion of Benshimol, employed to superintend the construction, but, proving unsatisfactory, was replaced by consent by Dexter Pratt, who continued to act until the work was suspended in January, 1889, as hereinafter stated. Monthly estimates were made by Moore, the city engineer, of the work done in October, November, and December, by the men employed by Benshimol, and were reported to the street commissioners and approved by them; and these amounts were paid to Benshimol and receipted for by him in the form "H. H. Pike & Son, by Joshua Benshimol." The estimate for the October work did not name by whom the work was done, while those for November and December described the work as done by H. H. Pike and Son.

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On October 18, 1888, an assignment of the contract was executed to Benshimol by Pike, as surviving partner of H. H. Pike and Son, providing however that any profits beyond the reimbursement to Benshimol of his expenditures should belong to Pike. This was never recorded, nor in terms communicated to the city or its officials. On November 19, 1888, however, another assignment was executed, transferring to Benshimol all interest under the contract, and this assignment was duly recorded on February 4, 1889. It also appeared that on December 10, 1888, Benshimol petitioned the board of aldermen of Waltham for reimbursement for insufficient estimates for the two preceding months by the city engineer, and, while he claimed that he was no longer bound as surety, still referred to the Pikes as contractors. A hearing was had before the aldermen, but no action was taken by them on the petition. Early in January, 1889, an agreement was drawn up by the city solicitor and signed by the mayor, providing for a suspension of the stone work until March 15 following. Pike had on January 4, 1889, signed a similar agreement for suspension until April 8 following; but this extension had not been agreed to by the city. On January 9 and 22 of that year the street commissioners notified Pike to attend to some filling, which was complied with by Benshimol, with the knowledge and to the satisfaction of the city engineer, who so certified on February 6. After the recording of the assignment of November 19, Benshimol, by his counsel, on February 9, 1889, requested the assent of the city thereto, which was refused by the mayor. At the expiration of the agreed suspension of work on March 15, the street commissioners addressed to Pike a notice requiring him to resume the conduct of the work. Pike did not comply with this, on the ground that he had no further interest in the contract; and Benshimol, who was informed of it at the time, denied the right of the city to treat or proceed with Pike, insisted on his own right to proceed independently of the latter, and to complete the work by any competent constructor, and, having made an arrangement with J. H. Leavitt to that effect, proposed him as such to the street commissioners. This proposal was rejected by the street commissioners. Benshimol then attempted to resume work with the same employees as he had had before the suspension, and was compelled by the

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city to desist, and the street commissioners thereupon offered the contract at Pike's risk, in pursuance of the provision in the contract above referred to, to Leavitt, and on April 17, 1889, contracted with him to finish the bridge for the sum of $21,865, which he did, and was paid that amount. It was admitted by the city that it had on hand over and above this payment to Leavitt, and $16,032.40, which was the amount paid to the Pikes or to Benshimol, the sum of $2,008.60, the balance of the contract price; but it did not admit Benshimol's title thereto.

The testimony fully established the knowledge by the city through all its officials, mayor, aldermen, street commissioners, and engineer, that after the accident to the Pikes the work was continued at the expense of Benshimol, and by the skilled workmen and superintendent in his employ; that there was no fraud or invalidity in the assignment to prevent its transferring the right to all moneys due under the contract for work done, and not lawfully paid out in pursuance thereof; and that there was also no question that the present suit was authorized by Pike.

But the amount sought to be recovered by Benshimol was not limited to the balance of $2,008.60. He contended that by the assignment he was entitled to the contract itself thereafter; that this was ratified and confirmed by the recognition of him by the city, especially by its acceptance of the work done by him during October, November, and December, 1888; that therefore the city had no right, as already mentioned, to treat with Pike, or insist on Pike's personal completion of the work in March, 1889, or to treat the latter's non-compliance as a breach; that the employment of Leavitt by the city was unauthorized; and that he, Benshimol, was not bound by the amount paid to Leavitt, but was entitled to recover in this action all that he or Pike had paid out under the contract, namely, $24,700.77, less only what they, or either of them, had received from the city, to wit, the sum of $16,032.40.

"It seemed clear upon the evidence, that, though the continuation of the work went on in the name of Pike and under the terms of the original contract, there was no understanding or expectation that he should resume its conduct personally, or that the skilled superintendence and labor given to it by Benshimol's employees should not continue to the end. These did in fact con-

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tinue for upwards of three months, during which time whatever was incurred and paid for the work, including the amount now sought to be recovered, was paid by Benshimol, and it was only after the two months' suspension by agreement that the street commissioners insisted on Pike's personal resumption. I report, therefore, subject to the ruling of the court thereon, that the city could not treat a continuation of the performance of the contract by Benshimol and his employees in the same manner as had already been approved of by it for the three months to January, 1889, as a breach entitling it to take the contract from Pike and Benshimol and employ Leavitt to finish the work at the plaintiff's expense.

"While, therefore, it did not appear but that if the contract had been fully performed by Benshimol, as he claimed the right to perform it, either through Leavitt or any one else, it might have cost him as much as Leavitt was paid by the city, yet the burden of proof appeared to be upon the defendant to establish this as a fact; and it could not, after terminating the contract without any breach on the plaintiff's part and depriving him of the opportunity of completing the work, charge him with what it expended for that purpose, without showing that he could not have done the work at less expense in the manner required by the specification. This it produced no evidence to show."

After deducting certain items, aggregating $445.87, the auditor found that the plaintiff was entitled to recover the sum of $8,222.50.

The defendant called as witnesses Henry N. Fisher, who was mayor of the defendant city during the entire period in which the bridge was being constructed, and also John F. Moore, who was the city engineer and in supervision of the work of construction under and by direction of the street commissioners of the city, who testified that on the tenth day after the service of the notice of March 15, 1889, to resume work, to wit, on March 25, 1889, Pike, in company with Moore, called on the mayor and asked for an advance of money, and stated that without it he could not proceed with the work, and such advance was refused, and Pike said he should not go on with the construction.

The above witnesses admitted that they testified substantially to the same facts before the auditor.

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In rebuttal, the plaintiff produced the man who was in charge of the work when the city compelled a suspension of it, and who was acting by direction of Benshimol, and so stated to the inspector; and he testified that he was on March 25, 1889, performing work required by the contract, when the inspector of the street commissioners ordered him to desist, whereupon, at his request, the inspector signed a memorandum stating the above facts. The plaintiff also introduced the auditor, who produced his notes of the testimony given by Henry H. Pike, now deceased, and testified that Pike before him testified that no work on the bridge was personally authorized by Pike after March 15, 1889, and that none was done except on March 25, 1889, which was being done under Benshimol's direction when ordered by the inspector to desist.

The defendant requested the judge to give the following rulings:

"1. If Pike, between March 15 and March 25 inclusive, did not do or authorize any work on the bridge, and Benshimol during that time performed work on the bridge, while claiming that he had a right to do so independently of Pike, and while denying the defendant's right to treat with Pike, such work was not the work of Pike or his agents and would not interfere with the right of the defendant to enter upon the work.

"2. If Benshimol worked on the bridge between March 15 and March 25, while claiming that he had a right to do so as the assignee of Pike, and while claiming that the defendant had no right to treat with Pike, and when Pike did not authorize any work, such work cannot now be availed of by Pike, on the ground that Pike and Benshimol acted upon a mistaken belief that the assignment to Benshimol and the conduct of the defendant as matter of law substituted Benshimol for Pike.

"3. If Pike failed to resume work within the ten days' notice given him under the contract, then the plaintiff is entitled to recover only such sum of money as is found due the plaintiff by the auditor, namely, the sum of $2,008.60, as a balance coming to him after the completion of the contract by the city.

"4. If Pike on March 25 gave the city notice that he did not intend to resume the construction of the bridge, either by himself or his agents, and did not resume, then the city, acting

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under the contract, had the right to sublet the contract and charge the same to Pike."

The judge found the facts to be true, as stated by the auditor and witnesses; refused all of the requests for rulings; and found for the plaintiff in the sum of $8,222.50. The defendant alleged exceptions.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

C. F. French, for the defendant.

M. M. Johnson, (*B. B. Johnson* with him,) for the plaintiff.

FIELD, C. J. The contract could not be assigned without the consent of the city, so as to substitute the assignee as a party to the contract in place of the Pikes. The city had a bond given by the Pikes, with sureties, and had a right to hold the Pikes and their sureties on the bond responsible for the due performance of the work by the Pikes. The Pikes could have performed the contract by means of agents, and, if Benshimol had continued to act as agent for the Pikes and had completed the contract as such agent, the contract would have been properly performed. But when Pike, the survivor of the two partners, assigned the contract to Benshimol, and renounced all interest in it, and when Benshimol offered to complete the contract, not as agent for the Pikes, but in his own behalf as assignee, the city had the right to refuse to permit Benshimol to go on with the work. If the city had assented to this, it would have released the Pikes from responsibility for any failure to complete the contract, would have lost the benefit of the bond, and would have relied wholly upon the responsibility of Benshimol for any subsequent breach of the contract. When Pike, the survivor, renounced all interest in the contract, and refused to go on with the work, he broke the contract, and the fact that Benshimol, on his own account as assignee, offered to complete the contract, is not equivalent to an offer to perform it by Pike. In the opinion of the majority of the court, the exceptions must be sustained.

So ordered.

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SINGER MANUFACTURING COMPANY *vs.* EDWARD F. REYNOLDS & another.

Suffolk. March 3, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Indemnity Bond — Action — Evidence — Penalty — Attorney's Fee.

A., as principal, and B., as surety, executed a joint and several bond to a corporation, which recited that it was "expressly intended as a continuing guaranty"; and which was conditioned that A., who had entered the employ of the corporation "for the transaction of such business as they may intrust to him," should faithfully perform his duties to the corporation "by virtue of his said employment, or otherwise, and whether under or in the absence of any present or future contract, agreement, or understanding, verbal or written, or any change whatever therein, either with or without notice to either of said obligors other than the said employee." At the same time the bond was executed, a written contract concerning his employment was entered into between A. and the corporation, and subsequently another written contract was made by them, which differed from the first one only in providing that A. should be paid a certain commission in addition to the compensation stipulated in the earlier contract. *Held*, in an action against A. and B. jointly upon the bond for a default occurring after the making of the last contract, of which contract it did not appear that B. had actual knowledge, that the bond covered such default.

An admission of a default by the principal in a bond of indemnity against loss by his misconduct is competent in evidence in an action against the principal and surety jointly on the bond.

A bond of indemnity against loss by the misconduct of the principal recited that the obligors were bound to the obligee in a certain sum "and ten per cent attorney's fees," for the payment of which they bound themselves jointly and severally. *Held*, in an action against the obligors jointly on the bond, that the provision for attorney's fees did not merely increase the penalty of the bond; but whether the provision for an attorney's fee was valid, *quære*.

CONTRACT, against Edward F. Reynolds and Andrew J. Leonard, upon a bond given for the faithful performance by the defendant Reynolds of his duties as an employee of the plaintiff corporation. Trial in the Superior Court, without a jury, before *Bond*, J., who found for the plaintiff; and the defendants alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

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J. D. McLaughlin, for the defendants.

A. M. Lyman, for the plaintiff.

BARKER, J. The bond was given by the defendants jointly and severally. The declaration is in one count against them both, and they appeared by the same counsel, who filed one answer for both. The finding is against them jointly for five hundred dollars as the penal sum of the bond, with an order for execution against both for a sum found due upon chancering the bond in accordance with Pub. Sts. c. 171, §§ 9, 10.

The defendant Reynolds was employed by the plaintiff, and three written contracts concerning his employment were entered into between him and the plaintiff, one at the same time as the bond, and the others on November 5, 1892, and June 17, 1893, respectively. The first and second were alike, and the third differed only in providing that Reynolds should be paid a commission on all moneys collected and paid over by him, in addition to the salary and commission on sales stipulated in the earlier contracts. It did not appear that the defendant Leonard had actual knowledge of the making of the last contract.

The presiding justice, sitting without a jury, held that the penal sum of the bond was five hundred dollars, found against the defendants in that sum, and included in his award of the amount for which execution should issue, a sum of fifty dollars, which was agreed to be a reasonable sum for services rendered by the plaintiff's attorney.

1. The first contention is that neither defendant is liable upon the bond, because Reynolds's defaults occurred after the making of the last contract, by which they contend that he was newly employed and the risk substantially increased. The bond states that it "is expressly intended as a continuing guaranty"; and the condition, after reciting that Reynolds has entered the employ of the plaintiff company "for the transaction of such business as they may intrust to him," is in substance that he shall faithfully perform his duties to the plaintiff "by virtue of his said employment, or otherwise, and whether under or in the absence of any present or future contract, agreement, or understanding, verbal or written, or any change whatever therein, either with or without notice to either of said obligors other than the said employee." These explicit stipulations cover the defaults of Reynolds under

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the last contract, which is within the precise terms of the bond. See *Amicable Ins. Co.* v. *Sedgwick*, 110 Mass. 163; *Singer Manuf. Co.* v. *Allen*, 122 Mass. 467; *Rollstone National Bank* v. *Carleton*, 136 Mass. 226; *Eastern Railroad* v. *Loring*, 138 Mass. 381. The cases of *Chelmsford Co.* v. *Demarest*, 7 Gray, 1, *Middlesex Manuf. Co.* v. *Lawrence*, 1 Allen, 339, *Lexington & West Cambridge Railroad* v. *Elwell*, 8 Allen, 371, and *Richardson School Fund* v. *Dean*, 130 Mass. 242, cited by the defendants, are not in point.

2. The defendants contend that the written statement or admission of Reynolds was not admissible in evidence against Leonard.* But the action was a joint action against both. It sufficiently appears that Reynolds was the principal and Leonard a surety. The admission of the principal was, under our decisions, admissible against both. *Martin* v. *Root*, 17 Mass. 222, 227. *Frye* v. *Barker*, 4 Pick. 382, 384. *Bridge* v. *Gray*, 14 Pick. 55, 61. *Amherst Bank* v. *Root*, 2 Met. 522, 541. It is urged that this doctrine should no longer be applied, because parties to actions may now testify, and because several judgments may now be rendered against joint defendants. But the doctrine has been restated by this court since those changes in practice have occurred. See *Choate* v. *Arrington*, 116 Mass. 552, 556; *Dennie* v. *Williams*, 135 Mass. 28, 29. We are disposed to adhere to it, so far as it is involved in the present case.

3. The remaining contention is that execution should not have been ordered for the attorney's fee as damages. The bond is in substance a bond of indemnity against loss by the misconduct of Reynolds, and it recites that the obligors are bound to the plaintiff "in the sum of five hundred dollars, and ten per cent attorney's fees," for the payment of which they bind themselves jointly and severally. The defendants asked a ruling that this provision was a part of the penalty of the bond. Upon that construction the bond would be the same in effect as if in the penal sum of

* The material part of this statement was as follows: "I, Edward F. Reynolds, of Johnston, in the county of Providence and State of Rhode Island, hereby acknowledge that I have received of moneys belonging to the Singer Manufacturing Company, said moneys being received in my capacity as agent of said company, and have appropriated the same to my own use, as follows," etc.

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five hundred and fifty dollars, in which case the judgment, under our practice, would be for that sum, and if that was the only effect of the provision, nothing would be included upon that account in the amount for which execution would be ordered.

We do not construe the provision as intended merely to increase by ten per cent the penalty of five hundred dollars. If it had merely been the intention to make the penal sum five hundred and fifty dollars, the parties would have caused the bond to be so written. The language makes the obligors' promise to pay two separate things, a sum of five hundred dollars, and a ten per cent attorney's fee. Each of these provisions was to be void, if Reynolds dealt faithfully. He has not so dealt, each promise has been broken, and the plaintiff asks to have each promise enforced. If the promise to pay an attorney's fee is an added penalty, one effect would be to increase the judgment, which must be for the amount of the penal sum. The defendants cannot complain that the judgment was not larger. The fair interpretation of the language is, that the obligors promised to pay to the plaintiff an attorney's fee of ten per cent unless Reynolds made no default, and this in addition to the payments which the bond would have obliged them to make if there had been nothing said in it as to an attorney's fee.

The defendant does not contend that the ten per cent should be reckoned upon the amount for which execution would otherwise issue, rather than upon the penal sum specified, nor that the provision for an attorney's fee is invalid, and we express no opinion upon those questions.

Exceptions overruled.

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FRANKLIN B. ROGERS *vs.* EVANGELICAL BAPTIST BENEVOLENT AND MISSIONARY SOCIETY.

Suffolk. March 8, 9, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Broker's Commission — Trial — Law and Fact.

If a verdict is ordered for the defendant in an action upon the facts agreed at the trial, the plaintiff's offer of proof, and the evidence, and there is a view of the evidence which, in connection with the facts agreed and offered in proof, would have justified a verdict for the plaintiff, a new trial will be ordered.

CONTRACT, to recover a broker's commission for placing a loan on property owned by the defendant called Tremont Temple, in Boston. Trial in the Superior Court, before *Sherman*, J., who, at the defendant's request, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

C. K. Cobb, for the plaintiff.

S. Lincoln & J. Lowell, Jr., for the defendant.

BARKER, J. A verdict for the defendant was ordered upon the facts agreed at the trial, the plaintiff's offer of proof, and the evidence. We are therefore to accept as true the facts agreed, and those of which proof was offered, and to inquire whether with those facts, upon any fair view of the evidence, the case should have been left to the jury. So far as the evidence was contradictory or inconsistent, the jury might have taken the view of it most favorable to the plaintiff; and if upon such a view he would be entitled to recover, the case should have been left to them.

The defendant is a corporation, and from March 1, 1894, had thirteen directors, six of whom were a finance committee. Joseph Sawyer, Joseph H. Converse, and John Carr were directors and of the finance committee. It was not in dispute that the defendant was seeking a loan; and by minutes from its directors' records, read in evidence, it appeared that on March 13, 1894, Converse and Carr were appointed a committee with full

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power to negotiate the loan, and that on March 27 they reported that it had been negotiated with a certain corporation, and the proper officers were directed to execute and deliver the necessary papers. It is agreed that the loan was actually made on July 12, 1894. The treasurer of the corporation which made it testified that the first proposition for it came from the plaintiff's servant, and the plaintiff offered to show that this was on March 12, 1894. It was agreed that the custom is, where a broker is employed to effect a loan, that if he introduces or brings the parties together, and a loan is ultimately effected, he is entitled to a commission.

The plaintiff testified that he was a broker, and that his attention was called to the fact that the defendant was to make a loan about March 2, 1894, by Sawyer, chairman of the finance committee; that he called on Carr on March 13, stated that he came in regard to the loan, and read to him a letter written to the plaintiff by Sawyer on March 5, and suggested to Carr whether he, the plaintiff, could place the loan; that he told Carr that it had been presented to parties on a basis of three and three quarters per cent, and he thought they would accept it; that Carr said they had been offered the money at four per cent and would be glad to save interest, and then asked who the parties were, and the plaintiff informed him; that Carr then made a memorandum, and said he would see about it that afternoon, that they were to have a meeting, and that the matter would be brought up, and that he did not want the loan hawked about; and that he replied that he was doing it quietly, and had presented it only to this one party at that time.

The letter of March 5 from Sawyer, which the plaintiff testified he read to Carr at this interview, stated that, while Sawyer was not authorized to speak for the trustees, he had no doubt, if a proposition came to them before they accepted the one then before them, they would take it at three and one half per cent and pay a commission; and that it had not been in the hands of any broker.

It might be found from the plaintiff's testimony that this interview was before the meeting of March 18, at which Converse and Carr were made a committee, with full power to negotiate the loan. Carr, however, who was called as a witness by the

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plaintiff, and who gave a very different account of the interview from that of the plaintiff, testified that his first interview with the plaintiff was after his own appointment upon the committee.

It is apparent that the jury might find that what occurred at this first interview was as stated in the plaintiff's own testimony, and also that the interview took place at the time stated by Carr, and after he was appointed upon the committee, so that it might be found that in all his interviews with the plaintiff he was acting with authority. From March 13, for several days, there were daily interviews between the plaintiff and Carr, at each of which the loan was talked about, and from the plaintiff's account of which the jury might find that the plaintiff was rendering services about the negotiation of the loan, upon a mutual understanding that, if it should be made by the corporation mentioned by the plaintiff in his first interview with Carr, the plaintiff would expect a commission. Carr's account of these interviews was quite different, and he testified, in substance, that at the outset and continuously he distinctly informed the plaintiff that the matter of getting the loan for the defendant was in the hands of another party, to whom it had been intrusted before his own appointment on the committee, and who was to have the commission, and that therefore he could have no conversation with the plaintiff, and that his subsequent talks with the plaintiff were out of the courtesy due to a visitor. Carr also testified that his first information as to the willingness of the lender to make the loan did not come from the plaintiff, but by telephone from an officer of the lender, before his interview with the plaintiff. But Carr also testified that at his first interview with Converse, either on March 13 or early the next morning, he told Converse that the plaintiff had brought his attention to the fact that he thought he could negotiate a loan with the lender; that he did not remember that Converse made any particular reply; and that he mentioned to Converse from time to time, probably as often as he saw him, that the plaintiff was calling on him every day, and that he and Converse were doing the business together, and that he supposed they were communicating everything of interest in the matter to each other.

If, as the plaintiff testified, he told Carr on March 14 that he

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was the first to suggest the loan to the party which finally made it, and that if the defendant took the loan from that company the plaintiff would expect a commission; and if on March 15 Carr told the plaintiff that they had given the other party one day more to secure the loan at four per cent from another corporation, and that, if the other party did not get the money, he should be very glad to have the plaintiff make a commission; and if on March 16 Carr told him that the other party was unable to get the money from the other corporation, and the plaintiff asked why he did not take the loan from the corporation which finally made it, and Carr replied that he wanted more light, and suggested that the plaintiff might find some one who would give him some light upon the tax question connected with the loan; and if on March 17 the plaintiff brought to Carr a person who did give him light upon the tax question, and all these things, which were certainly of interest in the matter of making the loan, were communicated from day to day by Carr to Converse as they met, it would seem that the plaintiff was in fact employed by Carr, and that his employment was recognized by both members of the committee.

Without going further into the evidence, enough has been said to show that, without regard to any question of ratification by the defendant itself, there was a view of the evidence which, in connection with the facts agreed and offered in proof, would have justified a verdict for the plaintiff. Stated concisely, the jury might find that the plaintiff went to Carr, a director, saying, "I am a broker and expect a commission, — I have a party who will give your corporation the loan at 3¾ per cent," and that Carr said, "Who are they?" and the plaintiff gave him the name. If Carr was a mere director, the employment, which might be inferred from his question and the plaintiff's answer, could be found to have been ratified by Converse and himself when appointed a committee with full power. If Carr was then upon the committee, there could be found an original employment by him, which could be found to have been ratified, if it needed ratification, by the other member of the committee.

Exceptions sustained.

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GEORGE A. PRATT *vs.* EDWARD E. BURDON.

Middlesex. March 11, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Contract — Insurance Broker — Statute.

The act of a person who is engaged in negotiating insurance in domestic companies, but has no license as either agent or broker authorizing him to negotiate insurance in foreign companies, in aiding a duly licensed agent of a foreign insurance company to effect insurance on a life by furnishing information upon a contract for pay, is to be deemed the act of an insurance broker or an insurance agent within the meaning of St. 1887, c. 214, §§ 87, 93, and an action cannot be maintained thereon.

CONTRACT, by a person engaged in negotiating insurance in domestic companies, having no license under St. 1887, c. 214, either as agent or broker, authorizing him to negotiate insurance in foreign insurance companies, against an agent of a foreign insurance company for one half of the commission upon the premiums paid to a foreign insurance company by two individuals for policies upon their lives.

Trial in the Superior Court, without a jury, before *Hammond*, J., who found for the defendant; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

W. S. Slocum, for the plaintiff.

G. A. Blaney & S. Robinson, for the defendant.

KNOWLTON, J. By the St. of 1887, c. 214, § 98, "Any person who shall assume to act as an insurance agent, or insurance broker, without license therefor," is punishable by a fine of not less than a hundred or more than five hundred dollars. The first part of § 93 of this chapter is as follows: "Whoever for compensation acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for a person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no person shall act as such broker save as provided in this section." Section 87 provides that "any person not a duly licensed insurance broker, who solicits insurance on

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behalf of any insurance company, . . . or offers or assumes to act in the negotiation of such insurance, shall be deemed an insurance agent within the intent of these statutes." The plaintiff, though engaged in negotiating insurance in domestic companies, was not licensed as an agent or broker under the statute. The defendant was engaged in transacting the business of life insurance, and was duly licensed as an agent.

The plaintiff, having information that two persons desired to obtain insurance upon their lives, went to the defendant, whom he knew to be a duly licensed agent to solicit life insurance in foreign companies, and inquired what compensation the defendant would give him if he would furnish this information to the defendant, and a contract was then made that he should have for the information one half of the commissions that the defendant should receive for the first year of the existence of policies upon the lives of these two persons. The plaintiff furnished the information in accordance with his contract, and the defendant, acting upon it, made contracts for insurance with them, upon which policies were issued. The court ruled "that, if the plaintiff had the names of the two men who desired life insurance, and offered to inform the defendant thereof for the purpose of and intending that the defendant should, in pursuance of such information, induce said men to take out policies of insurance on their lives in a foreign company, and the plaintiff was to be paid for giving such information by sharing in some proportion the commission payable by the insurance company on account of said policies, and the offer was accepted, and the defendant, having received the names from the plaintiff under this arrangement, and working thereunder, accomplished the insurance of the lives of such persons, then the plaintiff acted as an insurance broker within the meaning of St. 1887, c. 214, § 93, or as an insurance agent under § 87 of said chapter, and that this action cannot be maintained." Having found the facts in accordance with the hypothesis stated in the ruling, he entered a finding for the defendant.

The sole question is whether the plaintiff's act in aiding the defendant to effect insurance upon these lives by furnishing information upon a contract for pay is to be deemed an act of an insurance broker or an insurance agent within the meaning of

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the statutes. As throwing light upon the transaction, it is an important fact that the plaintiff was engaged in the business of negotiating insurance. What he did in his transaction with the defendant was plainly within the language of the statutes. For a compensation he aided in effecting insurance for a person other than himself. The aid that he rendered the defendant was apparently very important. Without it, the defendant very likely would never have heard of the persons who took the policies. The service was similar in kind to that ordinarily rendered by insurance brokers who are acting for agents. Bringing the parties together with a view to their making a contract is often the only service of a broker, and the terms of his employment are usually such that if a contract results he is entitled to his compensation. *Desmond* v. *Stebbins*, 140 Mass. 339. *Loud* v. *Hall*, 106 Mass. 404. *Gleason* v. *Nelson*, 162 Mass. 245.

If the plaintiff was acting as an insurance broker, his contract was illegal, and he cannot recover. *Duffy* v. *Gorman*, 10 Cush. 45. *Foster* v. *Thurston*, 11 Cush. 322. A majority of the court are of opinion that the ruling was correct.

Exceptions overruled.

CHARLES R. PRICE *vs.* THOMAS BASSETT & others.

Bristol. March 16, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Equity — Fraud, Undue Influence, Misrepresentation, and Conspiracy — Sale of Land by Life Tenant for Inadequate Price — Negligence — Rights of Remainderman.

One who is entitled to execute a power of sale by which the interests of others will be affected, is bound to exercise not only good faith, but reasonable care and diligence, and, if others are injured by the negligent exercise of the power, they may appeal to equity for redress.

To sell land, given by will to A. for life with power to sell any part of it if needed for his support, with a devise over of what remains at his death to B., for less than half its market value, the land being in active request, and at a sacrifice of more than two thousand dollars, without taking any steps or making any effort to find whether the price for which he sold was reasonable, or was the

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fair market value, or whether he could get more, and to do this advising only with the purchaser's agent, is, as matter of law, negligence on the part of A. in executing his power; and B. is entitled to equitable relief.

BILL IN EQUITY, to set aside a conveyance of an undivided third of certain real estate in New Bedford, alleged to have been obtained by the defendant Thomas Bassett from the defendant Keziah R. Price by means of fraud, undue influence, and misrepresentations, and by a conspiracy between him and Keziah and the defendant Orville Bassett, to deprive the plaintiff of his reversionary interest in the same. Hearing before *Morton*, J., who ordered the bill to be dismissed with costs, and, at the request of the plaintiff and with the consent of the defendants, reported the case to the full court. The facts appear in the opinion.

R. F. Raymond, (*A. McL. Goodspeed* with him,) for the defendants.

H. M. Knowlton, (*L. LeB. Holmes* with him,) for the plaintiff.

BARKER, J. The transaction which the plaintiff contends gives him a right to relief in equity was this. Abbie C. Bassett, who died in the year 1888, owning one undivided third of lands in New Bedford, gave by her will all her estate to the defendant Keziah R. Price, "for her entire use and benefit so long as she shall live, and with permission to sell and use the same, or any part of it, if she shall need it for her comfortable support and maintenance," with a devise over at her death of the whole property, or such part of it as remains, to the plaintiff in fee, if then living. On July 20, 1892, Mrs. Price being in such pecuniary circumstances as justified her in selling the land, sold it for $1,857, which was more than $2,000 below its value. She was not then in actual want, having a home and money in bank. The property which she sold was an undivided third of three parcels of land. She based the price for which she sold on an offer made by the plaintiff to the purchaser for the latter's interest in the same property, he being an owner of another undivided third, which offer had been withdrawn shortly before her sale. She took no steps to find out whether the offer was a reasonable one, or whether the sum for which she sold was the fair market value. She was not familiar with business matters, was over eighty-four years of age, feeble and infirm, and subject to frequent and protracted sicknesses. She

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made the sale to her son Thomas Bassett, who was in China and knew nothing personally of the transaction until after its completion, his brother Orville Bassett assuming to act for him. Orville Bassett also advised her in regard to the sale, and she did not make any effort to find out whether the price was the fair market value, or whether she could have got more. There was an active demand for real estate in the vicinity in which the land lay, and it was advancing in price. Besides this, she made the mistake of supposing that the interest which she sold was two ninths, instead of one third. She also had the notion that, as the land had come originally from Ezra Bassett, the father of Abbie C. Bassett, it should go back to the Bassetts, and she preferred that, as between Thomas Bassett, the purchaser, and Charles R. Price, the remainderman, it should go to Thomas rather than Charles. Thomas Bassett and Orville Bassett were her sons by her first marriage with Ezra Bassett, and Charles R. Price was her son by a second marriage.

Charges of actual fraud, undue influence, misrepresentation, and conspiracy made in the bill are negatived by the findings of the single justice by whom the case was heard, and by whom the bill was ordered to be dismissed, and the plaintiff now contends that, upon the facts as found by the presiding justice, he is entitled to equitable relief.

If we lay aside the facts that the sale was to her son, that she preferred as between the purchaser and the remainderman that the land should go to the former, and that she made the mistake of supposing that she was selling a less interest than that which her deed conveyed, there remain the facts that she made no effort to find out whether the sum for which she sold was the fair value of the property, or whether she could have got more, and that thus, without making due investigation, and without advice except from the agent of the purchaser, she sold land for which there was an active demand and which was increasing in price for less than one half its value, and for less by more than two thousand dollars than it should have brought at a fair sale. This is enough to entitle the remainderman to relief in equity. It is abundantly settled that one who is entitled to execute a power of sale by which the interests of others will be affected is bound to exercise not only good faith, but reasonable care and diligence,

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and that, if others are injured by the negligent exercise of the power, they may appeal to equity for redress. *Howard* v. *Ames*, 3 Met. 308, 311. *Oberlin College* v. *Fowler*, 10 Allen, 545. *Montague* v. *Dawes*, 14 Allen, 369. *Dyer* v. *Shurtleff*, 112 Mass. 165, 169. *Drinan* v. *Nichols*, 115 Mass. 353, 357. *Dexter* v. *Shepard*, 117 Mass. 480, 485. *Hood* v. *Adams*, 124 Mass. 481, 484. *Thompson* v. *Heywood*, 129 Mass. 401. *Briggs* v. *Briggs*, 135 Mass. 306, 309. *Clark* v. *Simmons*, 150 Mass. 357.

To sell land in active request for less than half its market value and at a sacrifice of more than two thousand dollars, without taking any steps or making any effort to find whether the price for which she sold was reasonable, or was the fair market value, or whether she could get more, and to do this advising only with the purchaser's agent was, as matter of law, negligence on the part of Mrs. Price in executing her power. The great inadequacy of price was the natural and proximate result of this negligence. The loss by reason of this inadequacy of price was prejudicial to the interests of the remainderman, and he is entitled to equitable relief.

It is not necessary now to decide what form the relief to be afforded shall take. The purchaser does not stand in the position of a purchaser without notice. His agent, who alone assumed to act for him in the purchase, had actual knowledge of all the circumstances of the sale, acting also as the adviser of the seller in relation to it. The purchaser is charged with this knowledge, and the land in his hands is subject to all the plaintiff's equities. The decree dismissing the bill must be set aside, and the case stand for further hearing before a single justice upon the facts found at the former hearing.

So ordered.

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ACTION.

1. In an action of contract against one of two owners of a vessel to recover for necessary supplies furnished for a fishing voyage, it appeared that as to a portion of the account the defendant personally ordered the articles and directed them to be charged to the vessel; that the rest seemed to have been furnished upon the master's orders, at the request of the defendant or of an agent of the two owners, and that the owners remained in control of the vessel, which was sailed on a certain lay, by which the master received a commission from the proceeds of the fish caught, and then, subject to certain other deductions, the proceeds were divided between owners and crew in a fixed proportion. *Held*, that the action could be maintained. *Paine* v. *Silva*, 432.
2. If B. refuses to allow A.'s daughter to remain longer in B.'s boarding school unless A. will accept B.'s construction of the contract under which

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A. placed her daughter as a pupil in the school, which construction is correct, that the officers of the school have absolute discretion to determine when a pupil shall be permitted to be absent, and A. refuses to accept this construction and takes her daughter away, she cannot maintain an action against B. to recover the money which she has advanced for a half year's board and tuition. *Curry* v. *Lasell Seminary Co.* 7.

3. If a mortgagor of land brings a bill in equity to redeem it from the mortgage, offering to pay the amount found due thereon, and to set aside a foreclosure sale, upon which a decree is entered granting the relief sought and giving him a certain time in which to redeem, the remedy so obtained is full and adequate, and if he fails to avail himself of it he cannot afterwards maintain an action against the defendant for conspiracy to defraud him of the land, and fraudulently to foreclose the mortgage. *Dennett* v. *Codman*, 428.

4. A. conveyed land to B. by a deed which, in the covenant against encumbrances, excepted a mortgage of a certain sum to a third person, but the covenant of warranty was absolute. There were in fact then outstanding two mortgages held by such person amounting to the sum named. B. on the same day executed a mortgage of the land for a smaller sum, containing a power of sale, to A. While the three mortgages were outstanding, C. attached the land as the property of B. A. then sold the premises under the power in his mortgage, for breach of condition, subject to the two prior mortgages, which were afterwards discharged upon payment by the purchaser to the mortgagee. Subsequently to the sale, C. recovered judgment against B., the execution issued thereon was levied on the land, and a deed was made to C. of all B.'s title in the premises on the date of the attachment. *Held*, that C. could not maintain an action against A. for breach of the covenant of warranty in the latter's deed to B. *Baker* v. *Bradt*, 58.

5. A lessee of real estate, which has been taken by a railroad company under the right of eminent domain, cannot, after his remedy against the company has been barred by lapse of time, maintain an action against the lessor to recover a part of the sum paid to him by the railroad company when the lessor, acting for himself alone, settled an action for damages brought by him against the railroad company, and gave to it a deed of the property previously taken. *Uhland Club* v. *Schupback*, 430.

6. A child less than seven years old entered a shop with her father, who was going to make a purchase. She intended to buy some candy, but in the first place accompanied him to a part of the shop at some distance from the candy counter and near to a coffee grinder. He let go her hand to get his money, and she went over to the coffee grinder, put her hand up the spout out of which the ground coffee came, hoping to get some whole kernels, and lost her fingers. *Held*, that she could not maintain an action against the shopkeeper for her injuries. *Holbrook* v. *Aldrich*, 15.

7. An action cannot be maintained for personal injuries occasioned to an employee by one who was acting as a fellow servant and not as a superintendent. *Brittain* v. *West End Street Railway*, 10.

8. If a servant of A. is sent by his master to repair machinery belonging to

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B., who directs him what to do, and while so engaged he is wholly under the control of B., although the latter relies largely upon his skill and experience, he is for the time the servant of B., and not of A., and if through his negligence another servant of B. is injured, an action for such injury cannot be maintained against A. *Samuelian* v. *American Tool & Machine Co.* 12.

9. An action for personal injuries sustained in consequence of being struck by an electric car on the cross walk of a street cannot be maintained when it appears that the plaintiff, who had good eyesight but was very deaf, at midday undertook to cross a street in a city at a place where cars and vehicles were almost constantly passing, without looking to the right or left, although there was evidence that the street was free from vehicles for a considerable distance in the direction from which the street car was approaching, and the plaintiff testified that, if he had looked in that direction, he could have seen a distance of three or four hundred feet, and also testified that he saw nothing approaching, and did not know when he was struck. *Hall* v. *West End Street Railway*, 461.

See AMENDMENT, 2; APPEAL; BENEFICIARY ASSOCIATION, 5; BOND, 2; BROKER; CHECK, 3; CONDITION; CONTRACT, 8; CONVERSION; DAMAGES, 3; DOMICIL; EMPLOYERS' LIABILITY ACT, 5; ESTOPPEL, 1; FALSE REPRESENTATIONS, 1; FEES, 2; GUARANTY, 2; HUSBAND AND WIFE, 2, 4; INSURANCE, 1, 6; LIBEL, 2–4; LIMITATIONS, STATUTE OF, 1–3; MASTER AND SERVANT, 3, 5–11, 13–15; NEGLIGENCE, 1, 2, 4, 9, 10, 13–15; PARTNERSHIP, 1–3; POOR DEBTOR, 2; REMOVAL OF SUITS; SHIPS AND SHIPPING, 2; STREET RAILWAY; SURVIVAL OF ACTIONS; TENANT AT WILL; VERDICT; WAGER.

ADJOURNMENT.

See MORTGAGE; TOWN; VERDICT, 2.

ADMINISTRATOR.

See ESTATES OF PERSONS DECEASED, 2; GUARDIAN AND WARD, 1; INSURANCE, 2; PROBATE COURT.

ADMISSIONS.

An admission of a default by the principal in a bond of indemnity against loss by his misconduct is competent in evidence in an action against the principal and surety jointly on the bond. *Singer Manuf. Co.* v. *Reynolds*, 588.

See LIMITATIONS, STATUTE OF, 4, 5.

AGENT.

See CONTRACT, 3; CORPORATION, 2, 3, 8; EVIDENCE, 19, 20; HUSBAND AND WIFE, 3; INSURANCE, 1; MONEY HAD AND RECEIVED; SHIPS AND SHIPPING, 2.

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AGREED FACTS.

See NEW TRIAL.

ALIMONY.

Alimony, though granted by a decree of the court in pursuance of an agreement of the parties, is not a vested right beyond the power of the court to change, and the remarriage of the wife is *prima facie* cause for its reduction to a nominal sum. *Southworth* v. *Treadwell*, 511.

AMENDMENT.

1. Under Pub. Sts. c. 167, § 42, it is within the power of a justice of the Superior Court, who has assessed the damages in an action for the conversion of chattels at $1,200, to allow an amendment by increasing the *ad damnum* in the writ from $1,000 to $1,500. *Luddington* v. *Goodnow*, 223.
2. An entry on the docket of this court, sitting for the county, in accordance with the direction in a rescript of the full court, of "Bill dismissed, with costs," is not a final decree, and, no formal decree having been extended or entered, it is within the discretion of the court to allow a motion to amend the suit, which is a bill in equity for the specific performance of a contract, into an action at law for damages for breach of the contract. *Merrill* v. *Beckwith*, 72.

See INSOLVENT DEBTOR, 4; MECHANIC'S LIEN, 2.

ANIMAL.

The meaning of § 27 of St. 1894, c. 491, entitled "An Act to codify and consolidate the laws relating to contagious diseases among domestic animals," is that the expense of isolation of animals upon the owner's premises is to be borne by himself without payment or reimbursement, and that the expense which is to be paid by the city or town, and in part to be reimbursed by the State, is only that of keeping animals isolated upon premises other than those of the owner or person in whose possession they were found when the order of isolation was made. *Kenneson* v. *Framingham*, 236.

See CONTRACT, 10.

ANSWER.

See JUDGMENT.

APPEAL.

S. was described in a writ as "of P. in the county of P. and State of Rhode Island," the officer's return of service reciting that he had attached a chip

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as the property of S., and summoned him "by delivering in hand, by direction of plaintiff's attorney, to W., as the attorney of the said S., a summons of this writ." S. having appeared specially in the Superior Court, and moved to dismiss the action for want of proper service on him, the motion was overruled, and S. appealed. *Held*, that because the question was one of the jurisdiction of the court, and on the face of the writ and the return of service indorsed thereon the Superior Court acquired no jurisdiction over S., the appeal would lie, and that the action should be dismissed. *Kimball* v. *Sweet*, 105.

See INSOLVENT DEBTOR, 4; RECOGNIZANCE, 2; WILL.

ARBITRATION.

See CONTRACT, 6.

ARREST.

1. Where a court has no jurisdiction of the subject matter of the controversy, or over the persons of the parties, an officer who is informed of facts concerning the truth of which he can have no reasonable doubt, which show, as matter of law, that the court has no jurisdiction, proceeds at his peril in making an arrest in a civil process, although the want of jurisdiction does not appear on the face of the process. KNOWLTON, J. dissenting. *Tellefsen* v. *Fee*, 188.
2. An arrest is valid which is made upon an execution that has been returned into court unsatisfied and its return entered upon the docket, and which is then redelivered before the return day by the clerk of the court to the officer, upon request, without an application to or an order of the court, a certificate authorizing such arrest having been granted subsequently after due proceedings. *Goldis* v. *Gately*, 300.

See EXECUTION; MANDAMUS.

ASSAULT.

A verdict of guilty of an assault with intent to commit larceny, rendered at the trial of an indictment under Pub. Sts. c. 202, § 26, which cannot be supported in its full extent, is not wholly invalid, but the defendant may properly be sentenced for an assault and battery, which is well charged in the indictment. *Commonwealth* v. *Crowley*, 222.

See EVIDENCE, 5.

ASSESSMENT.

See CERTIORARI; SEWER, 1, 2.

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ASSIGNMENT.

1. If the assignment of a policy of life insurance by the assured and his wife, to whom it is made payable, is absolute and *bona fide*, it is not necessary in an action thereon by the assignee that he should have an interest in the life insured, either as between himself and the company, which makes no objection, or as between himself and his assignors. *Dixon* v. *National Life Ins. Co.* 48.

2. In an action on a policy of life insurance brought by the assignee thereof, a ruling requested by the beneficiary named therein, who intervenes as a claimant, and who with the assured made the assignment, on the hypothesis that the assignment was for security only, is made immaterial by the finding of the judge that the assignment was absolute and *bona fide*. *Ibid.*

3. The St. 1886, c. 281, in allowing a defendant, when it appears that the amount of his liability, which is not in dispute, is claimed by another party than the plaintiff, to compel the claimant or claimants to interplead, does not exclude an equitable claim any more than interpleader proper; and the assignee of a policy of life insurance standing as a claimant of the residue in equity of the proceeds of the policy, in equity has a right to prove by parol that an assignment made by him to another although seemingly absolute, in fact was a mortgage or pledge. *Ibid.*

4. If a contract for the construction of a bridge is entered into with a city, which has a bond with sureties for the due performance of the work, and if during the progress of the work the contractor assigns the contract without the consent of the city, and afterwards renounces all interest in it and refuses to go on with the work, the city has a right to decline to permit the assignee to continue the work. *Pike* v. *Waltham*, 581.

See GUARANTY; PRIORITY; PURCHASER FOR VALUE, 2; TRADEMARK.

ATTACHMENT.

See ACTION, 4; BOND, 1.

ATTORNEY AT LAW.

1. If the provision of Pub. Sts. c. 159, § 39, relating to the removal from office of an attorney at law, was intended to cover only deceit or misconduct in the performance of his official duties, it does not limit the power of the court, at common law, to remove an attorney from his office, either permanently or temporarily, for crime or other gross misconduct not connected with any official act. *Boston Bar Association* v. *Greenhood*, 169.

2. Under Pub. Sts. c. 159, § 39, as well as at common law, the removal of an attorney from office may be absolute, leaving him to apply to the court for readmission if his offence was of such a kind that, after a lapse of time, he can satisfy the court that he has become trustworthy; or for a stated time, if the court is of opinion that the interests of the public will thereby be sufficiently protected. *Ibid.*

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3. It is enough if the respondent in a petition for his removal from the office of an attorney at law is reasonably and definitely informed of the matters alleged against him, and given an opportunity of being heard upon them; and if the general charge is in proper form, it is immaterial that the specifications are not proved exactly as alleged. *Boston Bar Association* v. *Greenhood*, 169.

4. An attorney at law, who was retained to contest the allowance of a will, drew an instrument and signed it in behalf of his clients, by the terms of which A., the other party to it, agreed to aid them to the utmost of her power in the contest, and, in the event of success, A. was to receive a certain sum, and they a certain proportion each of the net amount obtained. In pursuance of this agreement, A., who had lived in the testator's family for a considerable time before his death, interviewed witnesses and aided in procuring evidence. The attorney, although he had a duplicate of the agreement in his possession, did not make known its existence, but, without disclosing that A. had an interest of this kind, called her as a witness at the trial, and she gave material testimony upon the subject of the testator's mental condition; and when the existence of the paper was finally shown, on cross-examination, and the judge requested that it be produced by the witness, and understood that she would produce it, the attorney sent her away, telling her that when he wanted her again he would send for her. Four days later, the witness not having returned, the attorney, being called upon for an explanation, said that he had a duplicate of the original among his papers in court, and he then searched for it, but did not find it; and the paper was not exhibited until two days later, when the witness returned to the court and produced it. Upon the trial of a petition for the disbarment of the attorney, the judge found that he tried to suppress the evidence in question, and that he was guilty of deceit, malpractice, and gross misconduct in his office. *Held*, that the finding was warranted. *Ibid.*

5. An attorney at law, who was counsel for certain legatees under a will, knew when the executor filed his first account that he had failed to charge himself with as much by a certain sum for stock which he had sold as he ought to have done. The executor owed the attorney a sum of money which he declined to pay unless the attorney would assent to the allowance of the account in behalf of his clients. The attorney thereupon signed his assent in their names, obtained his pay, and the account was allowed. Upon the filing of the second account, he wrote to the executor's counsel, threatening the executor with an attack unless he paid the amount which his clients should receive, and proposing to keep the whole matter a secret if a payment was made. Upon the trial of a petition for the disbarment of the attorney, he testified that, when he assented to the first account, he intended, if his clients would authorize him so to do, to object to the allowance of the second account when filed, unless the executor would correct, to the extent of the interest of his clients, the first account. The judge found that he was guilty of deceit, malpractice, and gross misconduct in his office. *Held*, that the finding was warranted. FIELD, C. J., HOLMES & MORTON, JJ., dissenting upon the ground that the report of

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the judge showed that his judgment upon the specifications relating to this part of the case went upon a finding that the charges in those specifications were true as alleged, and was not reached from the point of view taken by the decision. *Boston Bar Association* v. *Greenhood*, 169.

6. If, upon the trial of a petition for the disbarment of an attorney at law, the facts found, with the inferences that may be drawn from them, warrant a finding that he was guilty of deceit and gross misconduct in his office, it is immaterial that, in making his findings of fact, the judge has not attempted to make a complete analysis of the conduct described, nor to state all the particulars in which it was culpable. *Ibid.*

See BOND, 4.

AUCTION.

See MORTGAGE, 2, 3.

AWARD.

See EVIDENCE, 12.

BAIL.

See RECOGNIZANCE.

BAILMENT.

See CONTRACT, 10.

BANK.

See CHECK, 1, 2; GUARDIAN AND WARD, 1; PLEDGE; PROMISSORY NOTE, 5.

BENEFICIARY ASSOCIATION.

1. Under St. 1882, c. 244, § 1, authorizing a corporation to apply property for the relief of its members and their "families," a member's sister, who was not dependent upon him and was not living with him, is not a member of his family, within the meaning of the statute. *Smith* v. *Boston & Maine Railroad Relief Association*, 218.
2. Where the last designation of a beneficiary in a certificate of membership in an association fails, a previous designation of another beneficiary remains in force, if valid. *Ibid.*
3. In an action upon a certificate of membership issued by a beneficiary association authorized by statute to apply property for the relief of its members and their "families," if a finding is made in favor of the widow of the member, who was living separate from him, it will be assumed by

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this court that the separation was a simple living apart without change in the legal relation. *Smith* v. *Boston & Maine Railroad Relief Association*, 213.

4. Under St. 1888, c. 429, § 11, the designation, in a benefit certificate issued by a corporation organized under the laws of another State and transacting business in this Commonwealth conformably to law, of a person resident in this Commonwealth who could not take under a certificate issued by such a corporation organized here, is valid, if permitted by the laws of the other State and of the corporation; and the contention that the corporation was authorized under the laws of the other State to do what is considered in this Commonwealth an accident and life insurance business as well as the business done by fraternal benefit associations, and that the contract is one of life insurance, is immaterial, for, even if the certificate should be regarded as a policy of life insurance, the contract was valid at the time when it was entered into, although the association had not complied with the requirements of Pub. Sts. c. 119. *Gibson* v. *Imperial Council of the Order of United Friends*, 391.
5. Where the laws of a beneficiary association provide that, if the secretary of a section fails to forward the monthly collections to the board of control on or before the last day of the month, the section and its members shall stand suspended and their certificates forfeited, and that if the money is paid to the board of control within thirty days after such default the section and its members may be reinstated, the payment does not become effectual until its receipt by the board of control; and if the money of a section is sent by mail on the first day of the month following a default to the board of control in another State, and arrives there on the third day, which is Sunday, and is delivered on the fourth day of the month, and a receipt for the money is sent on that day, which is expressed to be on the condition that all the members for whom the payment is made are living at the date of the receipt, and a member of the section, who has paid all his assessments, dies on the third day of the month, no action can be maintained upon his certificate of membership. *Campbell* v. *Supreme Lodge Knights of Pythias of the World*, 397.

BOND.

1. In an action against the sureties on a bond to dissolve an attachment, even if it is assumed that the contention of the defendants is correct that they only agreed, so far as the principal is concerned, to pay such judgment as might be recovered against it as an unincorporated association of individuals, and the only judgment recovered was against it as a corporation; yet that does not relieve them, if they also agreed to pay such judgment as might be rendered against either or both of them, and in the action to which the bond refers judgment was rendered against both as well as against the principal, and no part of it has been paid. *Way* v. *Murphy*, 472.
2. In an action against the surety on a bond conditioned that it was to become void only in case the principal should, within nine months after notifying the plaintiff, or the plaintiff notifying the principal, of a desire

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to close the account between them, pay the balance due the plaintiff, or any notes given in settlement of the account, the action having been brought more than nine months after the plaintiff notified the principal of a desire to close the account, it is no defence that the surety was not notified of such desire. *A. M. McPhail Piano Co.* v. *Meservey*, 209.

3. A., as principal, and B., as surety, executed a joint and several bond to a corporation, which recited that it was "expressly intended as a continuing guaranty"; and which was conditioned that A., who had entered the employ of the corporation "for the transaction of such business as they may intrust to him," should faithfully perform his duties to the corporation "by virtue of his said employment, or otherwise, and whether under or in the absence of any present or future contract, agreement, or understanding, verbal or written, or any change whatever therein, either with or without notice to either of said obligors other than the said employee." At the same time the bond was executed, a written contract concerning his employment was entered into between A. and the corporation, and subsequently another written contract was made by them, which differed from the first one only in providing that A. should be paid a certain commission in addition to the compensation stipulated in the earlier contract. *Held*, in an action against A. and B. jointly upon the bond for a default occurring after the making of the last contract, of which contract it did not appear that B. had actual knowledge, that the bond covered such default. *Singer Manuf. Co.* v. *Reynolds*, 588.

4. A bond of indemnity against loss by the misconduct of the principal recited that the obligors were bound to the obligee in a certain sum "and ten per cent attorney's fees," for the payment of which they bound themselves jointly and severally. *Held*, in an action against the obligors jointly on the bond, that the provision for attorney's fees did not merely increase the penalty of the bond; but whether the provision for an attorney's fee was valid, *quære*. *Ibid.*

See Admissions; Assignment, 4; Sewer, 2, 3.

BOSTON.

See Certiorari; Sewer, 2, 3.

BROKER.

Evidence that B., the owner of land, told A. that all over $7,500 "that you get for the land, or find a customer, you may have"; that A. afterwards offered the land for sale at $8,500 to certain persons, one of whom was C., who were about to form a corporation; that A. continued his negotiations with them, especially with C., for the sale, and notified B. that C. was the person with whom he was negotiating, and named the price; that a corporation was afterwards formed by these persons; that B. subsequently sold the land, through a lawyer, to the corporation, for $8,500; and that the check given in payment was signed by C. as treasurer, — will warrant

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a finding for A. in an action against B. to recover $1,000 for his services in procuring a purchaser for the land. *Hosmer* v. *Fuller*, 274.

See INSOLVENT DEBTOR, 6; INSURANCE, 1.

BUILDINGS.

See CONTRACT, 5, 9; COVENANT; EXCEPTIONS, 8; LANDLORD AND TENANT; MECHANIC'S LIEN; PETROLEUM.

BURDEN OF PROOF.

See EMPLOYERS' LIABILITY ACT, 3; PROMISSORY NOTE, 4.

CAPE COD SHIP CANAL.

1. The provision of St. 1883, c. 259, § 19, requiring the Cape Cod Ship Canal Company to deposit a certain fund with the Treasurer of the Commonwealth as security for the payment, among other things, of "claims for labor performed or furnished in the construction of said canal," does not include the official services of the president and clerk of the corporation, or the services of the chief engineer, or of the clerk in his office, or of the assistant engineer, in locating the canal and in making computations or surveys afterwards. *Crowell* v. *Cape Cod Ship Canal Co.* 157.
2. A claim for land damages, which has not been seasonably prosecuted and is barred by the special statute of limitations, cannot be allowed in a suit in equity to apply, to claims which it was intended to secure, the deposit required by St. 1883, c. 259, § 19, to be made by the Cape Cod Ship Canal Company with the Treasurer of the Commonwealth; nor can a claim founded on services rendered to earlier companies be allowed in such suit. *Ibid.*

CARRIER.

See CONFLICT OF LAWS; DAMAGES, 3, 5; NEGLIGENCE, 14.

CATTLE.

See ANIMAL.

CEMETERY.

See CORPORATION, 4, 7; EVIDENCE, 23; PARTIES; TRUST AND TRUSTEE, 1.

CERTIFICATE.

See ARREST, 2; BENEFICIARY ASSOCIATION, 4; CORPORATION, 8; EQUITY, 3; GUARDIAN AND WARD, 2; NEGOTIABLE INSTRUMENTS; PLEDGE.

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CERTIORARI.

Certiorari will lie to quash an alleged invalid assessment for the cost of a sewer, levied by the superintendent of streets of Boston, under St. 1892, c. 402, upon estates abutting on the street in which the sewer is built. *Bowditch* v. *Boston*, 239.

See SEWER, 1.

CHARITY.

See PUBLIC CHARITY.

CHECK.

1. A check deposited with a bank on the day of its date cannot be considered as overdue when so deposited. *Shawmut National Bank* v. *Manson*, 425.
2. If a bank receives a check from the payee, who indorses it, and the bank credits the amount thereof to the payee in his account as depositor, and permits the payee to draw against it before it receives notice through the clearing-house that the check has been dishonored, the bank must be regarded as a *bona fide* holder for value. *Ibid.*
3. The acceptance of a check, enclosed in a letter which refers to the amount as the balance due on the account between the parties, is not a bar to an action upon the account if the plaintiff ascertains from a subsequent statement sent to him at his request that the defendant has credited himself in the account with items which could not be allowed to diminish the amount due the plaintiff, nor does a silence of eighteen months after receiving the account preclude him from recovery; and there is no accord and satisfaction, if there was no controversy between the parties when the check was accepted by the plaintiff, and no compromise, or knowledge on his part that there was anything to be compromised. *McKay* v. *Myers*, 312.

CHILD.

See ACTION, 6; PARENT AND CHILD.

CITY.

See ANIMAL; ASSIGNMENT, 4; CERTIORARI; CONTRACT, 3; DAMAGES, 2; EVIDENCE, 9–13, 21; LAW AND FACT; SEWER.

CLERK OF COURTS.

See FEES.

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COLLATERAL SECURITY.

See ASSIGNMENT 2, 3; GUARANTY; GUARDIAN AND WARD, 2; PLEDGE.

COLLECTOR OF TAXES.

See EQUITY, 1.

COMMISSIONERS.

See EVIDENCE, 9, 11–13; WATER COMPANY, 1, 8.

COMMISSIONS.

See BROKER.

COMMITTEE.

See CONTRACT, 3.

COMPOSITION WITH CREDITORS.

See INSOLVENT DEBTOR, 1–3

COMPROMISE.

See CHECK, 3.

CONDITION.

The fact that one party to an agreement containing mutual and dependent stipulations has performed a substantive part of his contract, and will suffer loss unless the other party, who has done nothing to mislead him respecting the performance of his contract or to throw him off his guard, is held to his contract, will not justify the court in turning a condition precedent into an independent agreement, and in compelling the latter to resort to his claim for damages either by way of recoupment or action. *Griggs* v. *Moors*, 854.

See ACTION, 4; BOND, 2; CONTRACT, 8; COVENANT; FEES, 2; STREET RAILWAY.

CONDONATION.

See DIVORCE, 3, 4.

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CONFLICT OF LAWS.

A contract of carriage made in another State, to be performed in part there and in part in other States, and providing that the carrier is not to be liable for any injury or damage to the property, even if caused "from any fault, negligence, or carelessness, gross or otherwise," of itself or its servants or agents, is governed by the law of the State where made, and, if such provision is invalid there, it cannot be availed of in defence to an action on the contract here for injury caused by gross negligence on the part of the carrier or its servants or agents. *Brockway* v. *American Express Co.* 257.

See PARTNERSHIP, 3.

CONSIDERATION.

See CONTRACT, 5; LIMITATIONS, STATUTE OF, 2; PROMISSORY NOTE, 4.

CONSPIRACY.

See ACTION, 3; EVIDENCE, 21; EXCEPTIONS, 12; LAW AND FACT.

CONTRACT.

I. *Making.*

1. If an offer to sell goods calls for an immediate reply by telegraph, an answer by mail two days later is not in time to constitute a good acceptance of the offer. *Horne* v. *Niver*, 4.
2. If an offer is accepted by telegraph before a telegram revoking it has been sent, the acceptance being received before the revocation of the offer is received, the offer is outstanding when accepted, and there is a completed contract. *Brauer* v. *Shaw*, 198.
3. A city council passed a vote, purporting to authorize a committee to advertise for bids and to award the contract for the equipping of the city with a system of electric signals. The committee advertised for bids, and passed a vote to award the contract to A., who was the lowest bidder, "providing that the city government provide the committee with" a sum named "to purchase the system," and made a report to that effect, which was accepted by both branches of the city council. *Held*, in an action by A. against the city for breach of the alleged contract, that the power of the committee was exhausted by its action; and that, the city government never having provided the sum to purchase the system, no contract was made by the vote. *Municipal Signal Co.* v. *Holyoke*, 44.
4. At the trial of an action to recover the proceeds of sales of leather, a letter from the plaintiff to the defendant, put in evidence, stated that A. was under a contract to tan a large number of hides for the plaintiff, and to tan exclusively for him until the contract should be completed, and that

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the plaintiff owned the bark used in the business; and the plaintiff proposed in the letter to furnish information in regard to their relations, should there be occasion to do so. There was evidence that the plaintiff furnished A. money to pay the other expenses of conducting the business; that subsequently the defendant wrote to the plaintiff, proposing, with A.'s consent, to furnish a large number of hides to be tanned by A. on commission, the proceeds of the sale of the leather to be sent to the plaintiff; and that the plaintiff replied, assenting to the arrangement, and repeating in his letter the provision that the proceeds were to be sent to him. *Held*, that the evidence was sufficient to warrant the finding of a contract between the plaintiff and the defendant; and that the signing of an order by A., at the defendant's request, to pay the plaintiff the proceeds of sales of leather due from the defendant to A. did not deprive the plaintiff of his rights. *McKay* v. *Myers*, 312.

See ACTION, 1; BROKER; EVIDENCE, 20; INSURANCE, 2–4; SHIPS AND SHIPPING, 2.

II. *Consideration.*

5. A written agreement to subscribe money for the erection of a building, signed by A. and others, which agreement is virtually a promise to pay to such person or persons as shall be fixed at a meeting of the subscribers, is at the outset an offer; but when steps are taken in pursuance of a provision thereof that the details of the plan of organization and erection of the building shall be determined by a majority in number and interest of the subscribers at a meeting duly called for the purpose, and a plan is determined as therein provided and trustees are chosen, they become the promisees, and when they proceed to erect a building in reliance upon the subscriptions of A. and others, and before any withdrawal or retraction by A., that supplies a good consideration, the promise becomes valid, and A. is bound by his subscription. *Sherwin* v. *Fletcher*, 413.

See LIMITATIONS, STATUTE OF, 2; PROMISSORY NOTE, 4.

III. *Validity.*

6. An agreement, the evident intent of which is to submit all disputes relating to the performance thereof to the final decision of a tribunal constituted by the parties themselves, the referees both to assess damages and to determine whether there have been any violations of the agreement, and their decision in all matters to be final, is illegal and void. *Miles* v. *Schmidt*, 339.
7. By the terms of a contract between A. and B., A. was to receive for the services of himself and band, during two months, $24 for a week of seven days for each man, for the leader double pay, and for the soloist, when there was one, $10. A. performed his part, playing with the band at a seaside resort of which B. was the proprietor. On Sundays the afternoon concerts began from half past two to half past three, and there were also concerts in the evening. *Held*, in an action by A. against B. to recover a balance due him, that the contract was an entire one, and that the defence

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that, as some of the work and labor contracted for was to be done on the Lord's day, it was forbidden by the Pub. Sts. c. 98, §§ 1, 2, was good, as by that statute no concert of any kind could be licensed on the Lord's day, except after sunset. *Stewart* v. *Thayer*, 519.

See BOND, 4; CONFLICT OF LAWS; CORPORATION, 1–3; EVIDENCE, 22; INSOLVENT DEBTOR, 6; INTOXICATING LIQUORS; WAGER.

IV. *Construction.*

8. At the trial of an action to recover for engineering work performed in laying out, locating, and determining the permanent location of a railroad, under a written agreement whereby the plaintiff was to receive three thousand dollars in monthly instalments proportional to the amount of work done, until the whole work of location should be finished and the whole sum paid, and where there was no controversy that the work was seasonably done, a request for a ruling that no action would lie upon the agreement until the completion of the railroad, if it was built, or until the expiration of its charter, was properly refused, and the jury were properly instructed that by the terms of the contract the whole sum was due, and should have been paid when the plaintiff finished the work of fixing the location. *Worthington* v. *Plymouth County Railroad*, 474.

9. The owners of a wharf entered into a written agreement with A., who held a lease from them of the wharf, that he should erect a building thereon, that they should contribute a certain sum towards its cost, the balance of the cost being borne by him, and that at the expiration of the lease, unless it should be renewed, or on its termination for any cause, the building should be appraised by appraisers selected as therein provided, and they should pay to him the same proportion of the appraised value that the amount paid by him towards the cost bore to the whole cost thereof. The lease was not renewed at its expiration, but A. remained in possession of the premises as a tenant at will for over four years, when he sold and transferred to B. "the lease now held by me," and also the building erected by him on the wharf, subject to the terms and conditions contained in the lease and in the above named agreement, with certain qualified covenants of ownership of the property. Three years later, B. and C. executed an agreement, by which B. sold and transferred to C. the building in question, and C. agreed that, in case the owners took the wharf for other purposes and compelled him to give up possession, he would pay to B. all sums received by him from them as indemnity for the building under their agreement with A. over and above the sum which he agreed to pay for the building; and this agreement contained covenants of ownership, of freedom from encumbrance, of right to sell, and of full warranty. There was no appraisement of the building at the expiration of the lease, or afterwards; but the owners of the wharf continued to receive rent from A., B., and C. successively, until the latter finally failed in business and surrendered the premises to them, of which they then took possession for the first time. *Held*, in an action by C. against B. for breach of warranty, that there was a total failure of title to the building, which

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remained in the owners of the wharf; that B.'s liability under his warranty was not limited by the clause relating to indemnity; and that nothing appeared to reduce damages. *Handy* v. *Aldrich*, 34.

See ACTION, 2; BOND, 2; CONTRACT, 7; EVIDENCE, 18; INSURANCE, 8.

V. *Performance and Breach.*

See ASSIGNMENT, 4; CONDITION; GUARANTY; MECHANIC'S LIEN, 5, 8.

VI. *Rescission.*

10. At the trial of an action of contract to recover for the board of a horse, it appeared that the defendant left the horse at the plaintiff's stable to be boarded at a certain rate per week, without further agreement or explanation, and later attempted to stop his liability by a simple announcement to that effect, coupled with a refusal to take back the horse. The judge ruled that the plaintiff could recover nothing for the keep of the horse after he was notified that the defendant refused to pay; and the amount to be paid in case the ruling was wrong was agreed upon. *Held*, that the ruling was wrong, and that the plaintiff was entitled to recover the amount agreed upon. *Andrews* v. *Keith*, 558.
11. If, in an action against a corporation, brought by the president thereof to recover his salary and certain commissions, a finding is justified that his contract with the corporation, which was made by vote of the directors, was continued in force according to its terms at a later meeting, when the directors re-elected him president, a vote by them at a meeting held shortly thereafter purporting to rescind the original vote, which fixed the amount of the salary and commissions, will be regarded as nugatory. *Kimball* v. *New England Roller Grate Co.* 32.

See CONTRACT, 2; FALSE REPRESENTATIONS, 2.

CONTRACTOR.

See EXCEPTIONS, 8; LANDLORD AND TENANT.

CONTRIBUTORY NEGLIGENCE.

See ACTION, 9; EMPLOYERS' LIABILITY ACT, 3, 4; MASTER AND SERVANT, 13, 16; NEGLIGENCE, 1, 3, 4, 7.

CONVERSION.

A., who had bought of B. certain chattels situated in a building leased of C., took possession of them, and then let them to B. at a monthly rent, with a right to repurchase. Later B. notified A. that he was not in possession of the building. A. thereupon went to the building, which was closed, saw C. at the door, and demanded the property. C. replied that all property there belonged to B., and that he held it for unpaid rent, and advised A.

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to consult a lawyer. *Held*, in an action by A. against C. for conversion of the property, that the judge properly refused to rule that A. had not made out a case. *Luddington* v. *Goodnow*, 228.

See AMENDMENT, 1; ESTOPPEL, 1; EVIDENCE, 18.

CORPORATION.

1. A corporation, which is authorized by its charter to hold real estate, is not restricted, in leasing it to others, to such a use as the corporation itself may make of the property, in the absence of a prohibition in the charter against a lease for the use in question. *Nye* v. *Storer*, 53.
2. That a lease of its property by a corporation runs to persons who are directors of the corporation, is a suspicious circumstance, which calls for careful scrutiny, but it does not of itself alone necessarily render the transaction void. *Ibid.*
3. Although there is constructive fraud in a contract made by all the acting directors of a corporation with themselves as individuals which renders the contract voidable, there is no such fraud in a stockholder's voting upon a transaction between the corporation and himself; but such transactions will be set aside upon slight evidence of actual fraud. *Ibid.*
4. The St. 1841, c. 114, provided that any ten or more persons might organize as a corporation for the purpose of establishing a cemetery, in the same manner that religious societies were authorized to organize under Rev. Sts. c. 20. By the latter statute religious societies containing ten or more qualified voters might organize as a corporation in the manner specified. *Held*, that, in the absence of a provision requiring the presence of any particular number of persons at the first meeting, the fact that eleven persons signed the application for a meeting to organize a cemetery corporation, although they did not all attend the first meeting, would warrant the assumption that the corporation was legally organized. *Packard* v. *Old Colony Railroad*, 92.
5. The presumption of regularity extends to the proceedings in the organization of a corporation. *Ibid.*
6. If a corporation to which land was conveyed has lapsed, mere possession in the heirs of the grantor is not sufficient to show title in them. *Ibid.*
7. Where land is conveyed in trust for a cemetery corporation, whose records show that deeds of many burial lots were given for several years, and interments were made, and the land had not ceased to be used as a cemetery, the corporation is not dissolved by the omission to choose officers and to hold meetings; nor will the title to the land revert to the original grantor without due proceedings had for that purpose. *Ibid.*
8. At the hearing of a bill in equity to establish the invalidity of a discharge, executed by the president of a corporation, of a mortgage given to the corporation, it appeared that he did most of the corporation's business in the city where it had its office, and, before executing this discharge, made many deeds on its behalf, each of which had attached to it a certificate of what purported to be a vote of the directors authorizing the deed, signed

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by the secretary; that a similar certificate was appended to this discharge; and a purported copy of a vote giving the president a general authority to discharge mortgages was put in evidence; and it also appeared that the records of the corporation were out of the State, and could not be produced. *Held*, that there was ample evidence that the president had authority to execute the discharge in question. *Swasey* v. *Emerson*, 118.

See Beneficiary Association; Bond, 1; Broker; Cape Cod Ship Canal; Contract, 11; Equity, 3; Evidence, 23; Insolvent Debtor, 7; Negotiable Instruments; Parties; Partnership, 3; Trust and Trustee, 1; Work and Labor.

COSTS.

A landowner, who has applied, under St. 1890, c. 428, and acts in amendment thereof, to the Superior Court for a jury to assess his damages sustained by a change of grade of a highway, and has obtained a verdict in his favor, is not entitled to costs. *Alger* v. *Boston*, 516.

See Water Company, 3.

COUNSELLOR.

See Attorney at Law.

COVENANT.

Where, the debt secured by a mortgage being payable in five years, the mortgagor covenants with the grantee and his heirs and assigns that no building or part of a building shall be erected upon the granted premises for five years from the date of the mortgage, and that no building or part of a building erected thereafter upon the granted premises shall be more than two stories in height, and that these covenants shall be binding upon and available to heirs and assigns, and run with the land for the benefit of the adjoining land of the grantee, and in the condition it is further provided that, upon payment and other performance by the grantor, the deed, with the exception of the covenants above recited, shall be void, an intention is clearly manifested that the operation of the covenants shall not cease with the discharge of the mortgage, and the covenant that the land shall not be used for buildings of over a certain height is in effect the grant of an easement in favor of the adjoining premises, the violation of which may be restrained. *Brown* v. *O'Brien*, 484.

See Action, 4; Redemption.

CREDITORS.

See Insolvent Debtor, 1-5; Purchaser for Value.

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CRIMINAL LAW.

See Assault; Evidence, 21; Exceptions, 12; Jury; Law and Fact; Malicious Prosecution; Trial, 2, 3.

CRUELTY.

See Divorce, 1-4.

CUSTOM.

See Evidence, 14.

CY PRES.

See Public Charity, 3, 4.

DAMAGES.

1. When real estate has been taken under the right of eminent domain, damages will not be allowed either for improvements made by a life tenant for the convenience of his business, so far as they constitute a part of the real estate, or come within the description of fixtures, or for the injury caused to such improvements, so far as they are personal property, or for the loss of their use in his business. *Williams* v. *Commonwealth*, 364.
2. In an action against a municipal corporation, under Pub. Sts. c. 52, § 18, for injuries received in consequence of a defect in a public way, the defendant is liable in damages only for the direct and immediate results of the injury, and not for the results of a subsequent injury occasioned by the voluntary act of the plaintiff, which was not induced by any necessity caused by his previous injury. *Raymond* v. *Haverhill*, 382.
3. In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright and mental disturbance. *Spade* v. *Lynn & Boston Railroad*, 285; *White* v. *Sander*, 296.
4. In an action for personal injuries alleged to have been occasioned to the plaintiff by the negligence of the defendant's servant, the defendant has no ground of exception to an instruction to the jury that, if the plaintiff was entitled to recover at all, he was entitled to compensation for the wages actually lost by him through his inability to work at his trade on account of the injuries sustained by him. *Braithwaite* v. *Hall*, 38.
5. In an action for personal injuries, the instructions of the judge as to the rule of damages not being stated in the bill of exceptions, and no exception being taken to them, the court said that, if the plaintiff's services had a market value in the kind of business in which he was engaged, such market value might be proved to the jury as a fact which they might take into consideration in determining the amount of damages to be awarded to

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him, although he had not actually worked for others, but was engaged in business on his own account. *Harmon* v. *Old Colony Railroad*, 377.

See ACTION, 5; AMENDMENT, 1; CAPE COD SHIP CANAL, 2; CONDITION; CONTRACT, 6, 9; COSTS; EVIDENCE, 9–13, 15, 23; LIBEL, 2–5; PARTIES; PROMISSORY NOTE, 3.

DEATH.

See BENEFICIARY ASSOCIATION, 5; DIVORCE, 6; EMPLOYERS' LIABILITY ACT, 3, 4, 6, 7; MASTER AND SERVANT, 3; NEGLIGENCE, 4, 8; SURVIVAL OF ACTIONS.

DECEIT.

See ATTORNEY AT LAW, 1, 4–6; FALSE REPRESENTATIONS.

DECLARATION.

See EMPLOYERS' LIABILITY ACT, 7; INSOLVENT DEBTOR, 4; NEGLIGENCE, 2.

DECREE.

See AMENDMENT, 2; DIVORCE, 1, 2, 5, 6; ESTATES OF PERSONS DECEASED, 1; EXCEPTIONS, 10.

DEED.

See ACTION, 4, 5; CORPORATION, 7, 8; COVENANT; EQUITY, 2; EVIDENCE, 17; FRAUD; QUIETING TITLE; RESERVATION; TENANT AT WILL; TRUST AND TRUSTEE, 1.

DEFAULT.

See EXECUTION; MANDAMUS; SUPERIOR COURT.

DEFENCE.

See BOND, 2.

DEFINITIONS.

See WORDS.

DELIVERY.

See EVIDENCE, 4; INSURANCE, 2, 4.

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DEMURRER.

See NEGLIGENCE, 2.

DEPOSITION.

It is not necessary that the name of the magistrate should be inserted in a commission to take depositions issued under Pub. Sts. c. 169, § 40, if there is a proper designation by official title of the person who may take the deposition. *Tucker* v. *Utley*, 415.

DEVISE AND LEGACY.

A testator by will separated his homestead from the rest of his real estate, and gave his widow and unmarried daughter the use and improvement of it while they remained unmarried, the provision concluding "the use of said house and personal property to be shared equally by them, they paying the taxes and insurance thereon and keeping the same in repair, and at the decease of my said wife, I give the same to my two daughters and the survivor of them." *Held*, that the daughters took a remainder in fee as joint tenants. *Simonds* v. *Simonds*, 144.

See POWER, 2; PUBLIC CHARITY; TRUST AND TRUSTEE, 4–6.

DISCHARGE.

See CORPORATION, 8; COVENANT; DOMICIL; INSOLVENT DEBTOR, 5; LIMITATIONS, STATUTE OF, 2; POOR DEBTOR, 2; PRIORITY; PURCHASER FOR VALUE, 2; WAGER.

DISSEISIN.

See QUIETING TITLE.

DIVORCE.

1. If, in a libel for divorce for extreme cruelty and cruel and abusive treatment, it appears that, though the libellant was affected injuriously in his health to some extent by his wife's acts and words, she had no purpose to harm him in this manner, but in part was moved by what seemed to her good motives and by a desire for his success in life, and in part by her own nervous condition, she being in reality strongly attached to him and her feelings being affectionate, the decision of the justice dismissing the libel will be accepted as final. *Freeborn* v. *Freeborn*, 50.
2. At the hearing on a libel for the divorce of a wife from her husband on the ground of cruel and abusive treatment, there was evidence that the libellee had inflicted physical violence on the libellant by striking her

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with his fist, knocking her down, pushing her about, and pinching her; that he used profane and indecent language to her in the presence of their children, and that this course of treatment continued during a period when the libellee knew that the libellant was pregnant, so that her health was materially affected by his conduct. *Held*, that the evidence was sufficient to warrant a decree for the libellant. *Jefferson* v. *Jefferson*, 456.

3. At the hearing on a libel for divorce on the ground of cruel and abusive treatment, the judge properly ruled that a letter written by the libellant to the libellee condoning his misconduct, "if accepted and acted on by him, is conclusive evidence of condonation of all causes of divorce then known to the libellant, unless the libellee was guilty of such subsequent misconduct as legally to invalidate the same." *Ibid.*

4. To revive a cause of divorce for cruelty, it is not necessary that the misconduct subsequent to condonation should be sufficient of itself to warrant a decree for divorce without regard to the previous cruelty, but it is enough if there are such frequent acts of unkindness or persistent ill treatment as to warrant a well grounded belief that, if the cohabitation continues, the ill feeling will quickly break out in acts of gross cruelty. *Ibid.*

5. A decree in a libel for divorce based on a construction of the St. of 1889, c. 447, as to divorces in case of gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs, to the effect that the libellant would be entitled to a decree if, at any time after the statute was in force, the libellee was in the condition set forth in the statute, although the gross character of the use of the drug had become modified or had ceased when the libel was brought, is erroneous. *Burt* v. *Burt*, 204.

6. A decree of divorce nisi having been entered, the death of either party before the decree has been made absolute and before the time when it can be made absolute puts an end to the suit, and thereafter the divorce cannot be made absolute, either by order of court or by the operation of St. 1893, c. 280, § 1. *Chase* v. *Webster*, 228.

See ALIMONY; EVIDENCE, 16.

DOG.

See EVIDENCE, 2.

DOMICIL.

Evidence that a foreigner, who was a teacher of music, came to this Commonwealth under a contract made in another State, and rendered services thereunder for several months, until the contract was broken by the other party, for which breach an action was brought immediately; that, with the exception of two intervals of three and four months respectively, when he was out of the Commonwealth, he remained here until the trial, twenty months after the action was begun, returning after his first absence by the

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advice of counsel on account of the litigation, and giving music lessons during his whole stay here; and that, according to his testimony, when he first came here he intended, after finishing his contract, to remain here if he could establish a good business, and if he could not to return abroad, will warrant a finding that he had not made up his mind to make this Commonwealth his permanent place of abode, or to change his domicil; and his claim is not barred by a discharge in insolvency obtained after the action was brought. *Olivieri* v. *Atkinson*, 28.

DRUNKENNESS.

See DIVORCE, 5; EVIDENCE, 16.

DUE CARE.

See ACTION, 9; EMPLOYERS' LIABILITY ACT, 3, 4; MASTER AND SERVANT, 13, 16; NEGLIGENCE, 1, 3, 4, 7.

EASEMENT.

See COVENANT; RESERVATION.

ELECTION.

See PARENT AND CHILD.

ELECTRICITY.

See ACTION, 9; EMPLOYERS' LIABILITY ACT, 4; NEGLIGENCE, 4.

EMBEZZLEMENT.

See PLEDGE.

EMINENT DOMAIN.

See ACTION, 5; DAMAGES, 1; EVIDENCE, 23; PARTIES.

EMPLOYERS' LIABILITY ACT.

1. A temporary staging, put up by workmen engaged in slating the roof of a building, is not a part of the employer's "ways, works, or machinery," within the meaning of St. 1887, c. 270, § 1, cl. 1. *Reynolds* v. *Barnard*, 226.
2. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the fall of an overloaded staging upon which he

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was at work slating the roof of a building, it is a question for the jury whether the principal duty of the foreman in charge of the work was not that of superintendence, notwithstanding the fact that he was engaged in laying slate on the roof when the accident happened, and although he testifies, as a witness for the defendant, that he worked with his hands nine tenths of the time. *Reynolds* v. *Barnard*, 226.

3. In an action under the employers' liability act, St. 1887, c. 270, §§ 1, 2, and amendments thereof, brought by the administrator or next of kin of a person who was killed while in the performance of his duties as a switchman for the defendant, it is necessary for the plaintiff to show by affirmative proof that the deceased, when killed, was in the exercise of due care, and where the evidence leaves the manner in which the death occurred merely to conjecture, such action cannot be maintained. *Dacey* v. *New York, New Haven, & Hartford Railroad*, 479.

4. The insulation of an electric wire was burned off by lightning near a certain pole, and early in the evening A., a night lineman, was sent out. He found the pole where the electricity was escaping, went back again to the station, and had the electricity turned off from the circuit. He then returned, and by pushing the handle of a cut-out box on the pole made it impossible for the electricity to reach that pole. He then went back again to the station, and the electricity was turned on to the circuit, lighting all the lamps except the one upon the pole in question. About an hour and a half later, B., a night patrolman in the employ of the corporation, not knowing that there had been trouble, climbed up the pole, turned on the electricity by means of the cut-out box, as it was his duty to do when the trimmers had left it turned off, and received a shock which caused his death. *Held*, in an action therefor against the corporation, under the employers' liability act, St. 1887, c. 270, that the question whether he was in the exercise of due care was for the jury. *Held*, *also*, that evidence that, an hour or two after the accident to B., another of the defendant's men cut the wires running into the cut-out box and joined them above the box, and in that way cut the electricity off from the pole, was admissible to show what A. might have done; there being evidence that, if cutting the wires was the proper thing for the defendant to do, it was A.'s business to do it. *Willey* v. *Boston Electric Light Co.* 40.

5. The words "defect in the condition of the . . . machinery" in the employers' liability act, St. 1887, c. 270, do not refer to its working capacity, but to its condition with regard to the safety of the employees; and if such a defect may be remedied by a temporary device so as to remove the danger to the employees, a failure to adopt such means may be negligence on the part of the employer which will support an action under the statute. *Ibid.*

6. In an action under the employers' liability act, St. 1887, c. 270, for causing the death of an employee who died from a concussion of the brain, although there is evidence of a few scattered words having been uttered by him, the jury will be warranted in finding that he never regained consciousness so far as to suffer. *Ibid.*

7. If the declaration in an action under the employers' liability act, St.

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1887, c. 270, for causing a death by a defect in the condition of the defendant's works and machinery, points out correctly the general character of the defect, the precise nature of which is peculiarly within the defendant's knowledge, this is enough, and if it describes the defect further in a particular manner, the words may be stretched to cover the case, or they may be stricken out and leave the declaration good. *Willey* v. *Boston Electric Light Co.* 40.

8. Two ladders spliced together by employees, and placed against the side of a house for the purpose of painting it, do not necessarily constitute a part of the ways, works, or machinery of an employer under the employers' liability act, St. 1887, c. 270. *McKay* v. *Hand*, 270.

See ACTION, 7; MASTER AND SERVANT, 5-7.

ENCUMBRANCE.

See TITLE.

ENTRY.

See EXCEPTIONS, 1; FEES.

EQUITY.

I. *Jurisdiction and General Principles.*

1. The Superior Court has no jurisdiction of a bill in equity to redeem land sold by the collector of taxes for the non-payment of taxes. *Barker* v. *Mackay*, 76.

2. A husband who has made to his wife, through a third person, a voluntary conveyance, untainted with fraud and unaffected by any declaration of trust, of the house and land which is their home, for the purpose of preventing it from being taken by his creditors, cannot thereafter maintain a bill in equity for the cancellation of the deed on the ground that it was obtained by fraud, or that it was executed by accident or mistake. *Fitzgerald* v. *Fitzgerald*, 488.

3. A bill in equity cannot be maintained to compel a corporation, whose business is the buying and selling of real estate, to issue certificates for certain shares of its capital stock where it appears that the directors, pursuant to authority given to them by the stockholders, voted to increase such capital stock, and to authorize the president to sell or issue, in such manner as he saw fit, so much thereof as should not be taken by the stockholders; and that the president sold to the plaintiff, at private sale, certain shares of such new stock, and for money paid thereon gave a receipt, on behalf of himself and the corporation, reciting that, after a time stated, "a certificate for said shares will be issued by said company to the holder of this receipt, upon surrender of the same and payment in full for said shares at the par value," although, after the time stated, the plaintiff ten-

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ders payment in full for the stock and offers to surrender the receipt. *Smith* v. *Franklin Park Land & Improvement Co.* 845.

4. A., a manufacturer, put up awls in a distinctive package consisting of a bronze colored box having a brown label on the top and one side with printed inscriptions, and tied with an orange string. Ten years after A. began the use of this package, which use, though small at first, increased largely during the last two years, B., a manufacturer of awls, began to use a box indistinguishable in every particular, even to the words of the inscription and the size and shape of the type, except that at the bottom, in letters and arrangement as nearly like A.'s as possible, instead of "Manufactured and warranted by New England Awl and Needle Co.," in a certain town, the label read, "Manufactured for United States Awl and Needle Co.," in a certain city. *Held*, that A. could maintain a bill in equity to restrain B.'s acts. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.* 154.

See ACTION, 3; ASSIGNMENT, 3; CAPE COD SHIP CANAL, 2; CORPORATION, 3, 8; COVENANT; ESTOPPEL, 2; EVIDENCE, 17; FRAUD; MORTGAGE, 3; PLEDGE; POWER; PRIORITY; PURCHASER FOR VALUE; REDEMPTION; SUPREME JUDICIAL COURT, 1; TRADEMARK.

II. *Pleading and Practice.*

5. A general charge of fraud in a bill in equity, without stating facts in which the fraud consists, is not sufficient. *Nye* v. *Storer*, 53.

6. A finding of the master to whom a suit in equity has been referred, which seems to be immaterial, will not be disturbed, especially if the evidence reported shows some testimony in its favor. *S. K. Edwards Hall Co.* v. *Dresser*, 136.

7. Under the 31st chancery rule an exception to a master's report, which is not founded upon an objection filed before the master, will be overruled. *Ibid.*

8. The plaintiff in a suit in equity, which has been referred to a master, is not injured by the master's statement that the plaintiff could not maintain his bill upon the facts reported. *Ibid.*

9. An exception to a master's report, which contains no specification such as is required by the 32d chancery rule, will not be considered. *Ibid.*

See AMENDMENT, 2; INSOLVENT DEBTOR, 1, 2; MASTER IN CHANCERY.

ERROR.

See WRIT OF ERROR.

ESTATES OF PERSONS DECEASED.

1. Where the will of a testator left all his property, amounting to nine hundred dollars, away from his widow, so that, having waived the provisions of his will, she was entitled under the statute to all his property not needed for the payment of debts and charges of administration, and it did not

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appear whether there were any debts, the court said that an allowance of one hundred dollars was not unreasonable, the justice who made the decree having found that the petitioner was in necessitous circumstances. *Chase* v. *Webster*, 228.

2. In this case a petition to the Probate Court for license to sell the real estate of the intestate for the payment of debts and the charges of administration, brought nearly seventeen years after the petitioner was appointed administrator, was granted, the judge having found that one of the appellants who claimed title by deed took with full knowledge of all the equities, and that the petitioner had not been guilty of laches. *Abbott* v. *Downs*, 481.

See GUARDIAN AND WARD, 1; HUSBAND AND WIFE, 1; PROBATE COURT.

ESTOPPEL.

1. If a former verdict and judgment in an action for conversion may have gone on the ground that the defendant had committed no act of conversion at the time when the action was brought, they do not preclude the plaintiff from maintaining a subsequent action for the conversion of the same property. *Stone* v. *Addy*, 26.

2. Where, on a bill in equity to compel a railroad company to open and perpetually maintain a private way at grade across its tracks, it appears that the plaintiff has no title to the way by deed or grant and has not used it long enough to acquire a right in it by prescription, the way in another place which he had by prescription having been taken by the defendant and paid for in accordance with the verdict of a jury in an action at law, a decree overruling the exceptions of the plaintiff to the master's report, confirming the report, and dismissing the bill, will not be disturbed; and the finding of the master, that in fact and in law no right to the way claimed in the suit of equity was in issue in the former action or submitted to the jury for consideration, is correct, if no such issue was raised by the pleadings, the suggestion of the plaintiff's counsel that the jury might find that a substituted right of way had been acquired having been objected to by the defendant's counsel and not adopted by the court, and the report of the proceedings at the former trial shows plainly that the plaintiff gained, and the defendant lost, no rights by anything that occurred there in regard to the alleged way in question in the suit in equity. *Safford* v. *Old Colony Railroad*, 492.

See ACTION, 3; GUARDIAN AND WARD, 2.

EVIDENCE.

1. In an action to recover the proceeds of sales of goods, the plaintiff testified that he wrote a letter to the defendant and took a press copy of it himself, and also testified to a general course of business in conducting his correspondence which tended to show that he deposited the letter in the post office properly directed to the defendant; and, on cross-examination, he

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testified that he would not say, as a matter of memory, that he deposited this particular letter, but that he remembered writing and copying it, and that he did it in the general course of his business and in accordance with his usual custom, in pursuance of which he would naturally deposit the letter in the post office, properly directed and post-paid, soon after writing it. The defendant failed to produce the original letter upon notice; but a subsequent letter from the defendant to the plaintiff, put in evidence, contained indications that a letter referred to in it was the letter in question. *Held*, that the press copy of the letter was rightly admitted in evidence. *McKay* v. *Myers*, 312.

2. A license for a dog, issued prior to an act of biting for which the licensee is sued, is not admissible in the action to corroborate his evidence that the only dog which he ever owned was of a certain breed, weight, and color, differing in these particulars from the dog described in the plaintiff's testimony as the one which bit him. *Burns* v. *Stuart*, 19.
3. In an action upon a policy of insurance on the life of the plaintiff's husband, the question, put by the defendant's counsel to the plaintiff, whom he had called as a witness, whether she made objection to her husband to his taking the policy, is properly excluded. *Jones* v. *New York Life Ins. Co.* 245.
4. If the agent of an insurance company testifies for the defendant, in an action upon a policy issued by the company on the life of A., that the policy was never delivered, the plaintiff may introduce the testimony of witnesses to conversations with the agent in which the latter said that he "had insured" A., that A. "had taken out insurance," and that he "had written a policy" for A. *Ibid.*
5. In actions for an assault and battery, one by A. against B., and the other by B. against A., which were tried together, B. testified that A. struck him when he was down, and during the altercation between them a crowd collected; and that, while A. was on top of his back, C., a bystander, asked him to get off and let B. alone. *Held*, that the evidence was rightly admitted. *Hartnett* v. *McMahan*, 3.
6. Evidence of precautions taken subsequent to the occurrence of an accident is not competent to show prior negligence of the defendant. *Dacey* v. *New York, New Haven, & Hartford Railroad*, 479.
7. If, in an action for personal injuries occasioned to the plaintiff by the spilling upon him of molten iron from a ladle in consequence of the breaking of a shank in which the ladle was placed, the plaintiff testifies that at the time of the accident he and a fellow servant who was assisting him in carrying the implement were walking along at a pretty rapid rate, and another witness says that they were going between a quick walk and a dog trot, and there is evidence tending to show that running with a ladle upon the shank had been forbidden on account of the strain it put upon the shank, evidence that the plaintiff and his fellow servant were running with the ladle on the two trips immediately before the accident is admissible on the question whether the shank had been put to any improper strain by the plaintiff and his companion. *Coleman* v. *Mechanics' Iron Foundry Co.* 254.

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8. In an action for personal injuries occasioned to the plaintiff by the breaking of a rope attached to one corner of a swinging stage and to the mast of a vessel lying at a wharf, while he was engaged in trucking bags of cement and mortar to the defendant's warehouse, evidence that different kinds of staging were used for unloading sugar elsewhere is immaterial. *Moynihan* v. *King's Windsor Cement Dry Mortar Co.* 450.

9. Where it is the duty of commissioners under a statute to find the fair value of the property of a water company for the purposes of its use by a city, which is authorized to purchase it, and they are to find that value "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company," the exclusion of evidence of the net earnings of the company in the past, at a hearing on a petition by the company for a valuation of the property so purchased by the city, is not a sufficient ground for recommitting the report of the commissioners. *Newburyport Water Co.* v. *Newburyport*, 541.

10. Where the officer who made the tax returns setting forth the value of the stock of a water company is called by that company at a hearing on its petition for a valuation of its property, which has been purchased by a city, and testifies to the value of that property, on cross-examination the respondent may be allowed to identify the tax returns made by him and to put them in, if they have some tendency to show a smaller value of the property than that given on the stand by the witness, and so to contradict him. *Ibid.*

11. At a hearing before commissioners on a petition by a water company for a valuation of its property purchased by a city conformably to a statute, the respondent introduced evidence that a few days before the transfer to it of the property of the company the rates of insurance were advanced in the city because of defects in the water system. *Held*, that its introduction did no harm beyond tending to prove that the water works were not as good as the average, a fact which if proved could hardly affect the valuation as the commissioners arrived at it. *Ibid.*

12. At a hearing before commissioners on a petition by a water company for a valuation of its property purchased by a city conformably to a statute, evidence having been introduced as to the price obtained by the contractor, who built the works for the company and who owned most of the stock, for some of his shares sold by him soon after the works were constructed and a number of years before the petition was brought, the court said that it was not prepared to say that the evidence was inadmissible, but it gave a value for the total property so far away from the award that it was not necessary to discuss the question, since it was not adopted as a standard. *Ibid.*

13. At a hearing before commissioners on a petition by a water company for a valuation of its property purchased by a city conformably to a statute, evidence of the sum paid by the city after the property was conveyed to it to a person for the use of his spring, as bearing on the value of the water, having been admitted, the court said that the evidence did not appear to be open to the objection that his acceptance of the sum was compulsory, or that it was very different from the price paid by the petitioner for water from the same spring not long previous to the conveyance. *Ibid.*

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14. At the trial of an action for personal injuries received by the plaintiff while alighting from a street car, caused by the sudden starting of the car in response to a signal given by a passenger standing on the rear platform, evidence offered by the plaintiff tending to show a habit of passengers on the defendant's road to give the signals for starting and stopping cars is properly admitted. *Nichols* v. *Lynn & Boston Railroad*, 528.

15. Where, in an action for personal injuries, the only ground relied on in support of the exceptions was that it was not competent for the plaintiff to show what his services would be worth in the market to other persons, the court said that, while, upon reading the bill of exceptions, it was hardly to be supposed that this question was presented or ruled on at the trial, yet, if it was, the evidence was competent. *Harmon* v. *Old Colony Railroad*, 377.

16. At the trial of a libel for divorce under the St. of 1889, c. 447, for gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs, witnesses, some medical and others not, but who have been with the libellee for a long period of time and were familiar with her habits as to the use of morphine and its effects upon her, may state that, in their opinion, at various times when they saw her, she was under the influence of morphine. *Burt* v. *Burt*, 204.

17. At the hearing on a bill in equity to set aside a deed alleged to have been obtained by fraud and misrepresentation from a woman advanced in years and incapacitated from attending to business, a witness who has known the grantor all her life may be asked, to show her mental condition at the time of the execution of the deed as compared with her mental condition when appearing in court, "State whether the plaintiff has failed or has not failed in her mental capacity during the past five years." *Clark* v. *Clark*, 523.

18. In an action for the conversion of certain chattels which had belonged to A. and B. as copartners, the plaintiff claimed under a sale by B. of his half to A., and a later sale of the whole by A. to the plaintiff. It appeared that A. and B., upon dissolving the partnership, executed an instrument under seal, by which B. agreed that he would "not take or claim any part, share, or interest in said business, or interfere in any way therewith." *Held*, that evidence was admissible to show that, after the instrument was executed, A. noticed that the chattels in question were not mentioned, and spoke about it in the office of the lawyer who drew the instrument; that B. said they would have no more trouble about it; and that both agreed that there was no need of drawing the instrument over again. *Luddington* v. *Goodnow*, 223.

19. In an action to recover salary due to a salesman, who was hired by an agent of the defendant, a written receipt for money received by the plaintiff from the defendant through the hands of the agent is admissible in evidence, as an act or declaration of authority by such agent, without showing that the defendant had personal knowledge of it at the time it was taken by his agent, when it is offered in connection with evidence that the defendant had authorized his agent to employ salesmen and to contract with them in the defendant's name, had advised him to hire the

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plaintiff, and had furnished his own checks, drawn to the order of the plaintiff, in payment of his salary and expenses. *Crawford* v. *Moran*, 446.

20. In an action by A. upon a contract between himself and B., who was the agent of C., signed by A., B., and C., by which B. employed A. as a salesman for C., A., in order to negative the theory that he gave exclusive credit to B., may testify that when he signed the contract and acted under it he relied upon C. *Ibid.*

21. The voluntary statements of alleged conspirators before an investigating committee of a city council, of which one of them was a member, are admissible in evidence at the trial of an indictment against them for the conspiracy. *Commonwealth* v. *Hunton*, 130.

22. In an action for the price of intoxicating liquors sold here and sent to a dealer in liquors in another State, the statutes of that State, prohibiting the sale of such liquors there by any person not an agent of a town for that purpose, are properly admitted in evidence; and evidence that the buyer had never been such an agent is also admissible. *Wasserboehr* v. *Morgan*, 291.

23. Ancient books, purporting to be the records of a cemetery corporation, produced from the custody of the last secretary of the corporation, are competent evidence upon the trial of a petition for an assessment of damages caused by the taking of land conveyed in trust for the corporation by the heirs of the grantor claiming title thereto. *Packard* v. *Old Colony Railroad*, 92.

See ADMISSIONS; CONTRACT, 4; CORPORATION, 8; DAMAGES, 5; DEPOSITION; DIVORCE, 2, 3; EMPLOYERS' LIABILITY ACT, 2–4, 6; EQUITY, 6; EXCEPTIONS, 5, 8–12; FALSE REPRESENTATIONS, 1; FRAUD; INSURANCE, 2, 4; JURY; LANDLORD AND TENANT; LAW AND FACT; MASTER AND SERVANT, 1, 7, 8, 14, 16, 19, 20; MASTER IN CHANCERY; MECHANIC'S LIEN, 7; NEGLIGENCE, 3, 5, 8, 9; NEW TRIAL; PROMISSORY NOTE, 2, 4, 5; SUPREME JUDICIAL COURT, 2; TRIAL; VERDICT, 1; WILL, 2.

EXCEPTIONS.

1. A petition to this court to establish the truth of exceptions was, on the nineteenth day after notice to the petitioner's attorney of the disallowance of the exceptions, presented at the office of the clerk of courts for the county of Bristol, with a request that it be immediately entered and filed, and, in the absence of the clerk, it was received by a person employed in his office, who indorsed thereon that it was filed and entered on that day. No entry fee was then paid or demanded, but, on the second day thereafter, upon notice received from the clerk that the petition was not filed or entered for the reason that no entry fee had been paid, the petitioner's attorney, whose office was in Boston, forwarded the entry fee by mail, and stated that it would have been paid when the petition was presented had it been understood that it was required. On the following day the entry fee was received by the clerk, who thereupon made an entry on the docket that the petition was on that day filed and entered. *Held*, that,

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on the facts, the petition was properly filed, within the meaning of Common Law Rule XXX., when it was presented and received at the office of the clerk. *Clemens Electrical Manuf. Co.* v. *Walton*, 304.

2. If no notice of the filing of exceptions is given to the adverse party within twenty days after the verdict in the case, the exceptions will be discharged. *De Bang* v. *Scripture*, 91.

3. Exceptions being obviously untenable, the court passed by the question whether the excepting party lost his right of exception by omitting to give due notice of the filing of the exceptions. *Stone* v. *Addy*, 26.

4. By Pub. Sts. c. 153, § 8, no exception lies to a judgment of the Superior Court overruling a motion to dismiss an action for want of proper service of the writ. *Smith* v. *Ferguson*, 303.

5. If a case comes to this court on exceptions, with a report of the evidence, consisting of the testimony of witnesses at two former hearings, the first of which was before the same judge who sat in the final hearing, at which no witness testified orally, but the testimony taken at the former hearings was read to him, the evidence before him cannot be treated as merely documentary, and the questions before this court are whether his findings of fact were warranted by the evidence, and whether his conclusion of law therefrom was right. *Olivieri* v. *Atkinson*, 28.

6. No exception lies to the refusal to give an instruction requested which is not applicable to the facts proved. *Commonwealth* v. *Crowley*, 121.

7. In this case the court were of opinion that the ruling requested was given, and that no exception was open. *Webster* v. *Melrose*, 5.

8. In an action against a landlord for personal injuries sustained by his tenant, while passing over a cellar staircase, in consequence of its collapse, caused by the fact that a contractor employed by the landlord to deepen the cellar had removed the earth which supported the staircase, no exception lies to the exclusion of the question to the contractor whether the defendant had any control over the contractor's men, the defendant having been permitted to show the facts as to his control. *Robbins* v. *Atkins*, 45.

9. In an action for personal injuries received by the plaintiff, while in the defendant's employ, from the blow of a swinging log, which was being hoisted from the ground with a pile-driver, near which the plaintiff was at work, no exception lies to the refusal to allow his counsel, in his argument, to appeal to the common knowledge and experience of the jury concerning the use of a guy rope, and to argue that it was gross carelessness on the defendant's part not to use such a rope to steady the log at the time of the accident; the testimony of witnesses called by the plaintiff to prove that it was customary to use a guy rope under similar circumstances not having been admitted, because they failed to qualify as experts. *De Lisle* v. *Ward*, 579.

10. If a bill of exceptions alleged at the trial of an appeal from a decree allowing a will states that certain circumstantial evidence therein set forth, with other evidence of a similar kind, was the only evidence relied on to show that the testator's widow used undue influence upon him to induce the making of the will, no ground of exception is shown to the statement by the judge in his charge to the jury that there was no direct evidence upon that point. *Maynard* v. *Tyler*, 107.

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11. No exception lies to the statement by the judge in his charge to the jury, that "the substance of the testimony" of a group of witnesses was of a certain character, if it is fairly stated. *Maynard* v. *Tyler*, 107.

12. At the trial of an indictment for conspiracy, if the effect of each statement made by the defendants before an investigating committee of a city council of which one defendant was a member is, when admitted in evidence, limited to the party making it, a ruling that the statements were evidence tending to show the part which each took in the conspiracy, if any conspiracy was proved, and that there was concerted action between them, is not open to exception. *Commonwealth* v. *Hunton*, 130.

See DAMAGES, 4, 5; EQUITY, 7, 9; EVIDENCE, 15; FEES, 1; MALICIOUS PROSECUTION; MASTER AND SERVANT, 2; PROMISSORY NOTE, 2.

EXECUTION.

When one of two judgment debtors, having been arrested on execution, enters into a recognizance, and then makes default, an alias execution, reciting the joint judgment, may, upon the return of the original execution, issue against the person and property of the other judgment debtor. *Thomson* v. *Sleeper*, 373.

See ACTION, 4; ARREST, 2; MANDAMUS.

EXECUTOR.

See HUSBAND AND WIFE, 2.

EXPERT.

See EVIDENCE, 16, 17; EXCEPTIONS, 9.

FALSE IMPRISONMENT.

See ARREST, 1.

FALSE REPRESENTATIONS.

1. In an action for deceit for false representations as to the value of certain notes, it appeared that they were turned over to the plaintiff, who was a woman, in part payment of the agreed price for land sold to the defendant; that he professed to know, and probably did know, all about the financial standing of the maker of them, who lived in Boston, while the plaintiff lived in a suburban town and knew nothing of the maker; that she was obliged to take the defendant's representations or to decline to deal with him until she could go to Boston and make an investigation for herself; that he represented the notes to her to be as good as gold, and told her that he had lent money to the maker, saying, "Do you suppose I would lend my money to any one that was not good?" *Held*, that the evidence was

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sufficient to warrant a finding that the false representations were actionable. *Andrews* v. *Jackson*, 266.

2. If an action does not rest upon a rescission of a contract, but upon an affirmation of it, and upon a claim for damages for false representations in regard to certain notes delivered to the plaintiff under it, a request to rule "that the tender of the notes at the time of the trial was made too late to effect a rescission of the contract, or that part of it relating to the notes," is rightly refused. *Ibid.*

FEE.

See DEVISE AND LEGACY; HUSBAND AND WIFE, 1; TRUST AND TRUSTEE, 1.

FEES.

1. Under St. 1891, c. 87, § 1, a fee of three dollars is payable to the clerk of courts upon the entry of a petition to establish the truth of exceptions. *Clemens Electrical Manuf. Co.* v. *Walton*, 304.
2. The provisions of St. 1888, c. 257, § 8, that "the clerks of the courts shall collect all fees in advance," and of St. 1891, c. 87, § 1, that "no suit, action, libel for divorce, or petition shall be entered or filed by the clerk until said [entry] fee is paid," are directory to the clerks, and do not prescribe a condition precedent to the rights of parties under processes which have been duly entered in court without the payment of the proper fees in advance. *Ibid.*

See EXCEPTIONS, 1.

FIRE INSURANCE.

See INSURANCE, 5, 6.

FIXTURES.

See DAMAGES, 1.

FORCIBLE ENTRY AND DETAINER.

1. If a person who purchases an estate at a sale under a power contained in a mortgage, with a provision authorizing the mortgagee to purchase at the sale, is the agent of the mortgagee, and the conveyance to him from the mortgagee and the reconveyance by him to the mortgagee are simultaneous acts, an action against the mortgagor's lessee to recover possession of the estate may be maintained by the mortgagee, under Pub. Sts. c. 175. *Allen* v. *Chapman*, 442.
2. In an action on Pub. Sts. c. 175, to recover possession of premises occupied by the defendant under a lease, to whom a notice to quit for nonpayment of rent is delivered for service to an officer, whose return recites

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that he left an attested copy of the notice at the defendant's last and usual place of abode, if the officer testifies that he went to the house occupied by the defendant, and, in response to his ringing of the door bell, a woman opened a window and asked him what he wanted, to which he replied that he had a notice for the defendant, and she said she would give it to him, and he then handed her a copy of the notice given him to serve, the jury will be justified in finding that the woman was the wife or servant of the defendant; and, if she was either, this constitutes a sufficient service. *Steese* v. *Johnson*, 17.

FORECLOSURE.

See ACTION, 3, 4; FORCIBLE ENTRY AND DETAINER, 1; MORTGAGE.

FOREIGN CORPORATION.

See BENEFICIARY ASSOCIATION, 4.

FORFEITURE.

See BENEFICIARY ASSOCIATION, 5.

FORMER JUDGMENT.

See ESTOPPEL.

FRAUD.

At the hearing on a bill in equity, brought to obtain the cancellation of a deed by which the plaintiff conveyed to the defendant all rights in the property of his deceased wife, there was evidence that the plaintiff's wife had died without issue seised of real estate of the value of $3,100, which, without the written consent of the plaintiff, she had devised to her brothers and a sister; that the defendant, who was the executor of her will, represented to the plaintiff that he had no rights or title to his deceased wife's house, and that nothing had been left to him by her will, and *told him* that he, the defendant, would do the best he could for him; and that subsequently the defendant procured the plaintiff to execute the deed in question upon the payment to him of the sum of $400. Evidence was also offered and excluded that the defendant, prior to the execution of the deed, said to the sister of the plaintiff that the plaintiff "had been left out, and there was nothing in the will for him, and he can get more with me than he can get in any other way, . . . the will is made and not one dollar to" the plaintiff; that the defendant then offered to let the property to her, telling her that he had the whole charge of it; that he had asked D., one of the devisees in the will, to testify that he had sent the plaintiff to the defendant to arrange for a sale of the property, and that, on receiving D.'s reply that he would not lie for anybody, the defendant said he

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had no further use for him. *Held*, that the excluded evidence should have been admitted, and that it, in connection with the testimony in the case, would have warranted a finding that the deed was procured by fraud, from which the plaintiff was entitled to relief. *Motherway* v. *Wall*, 333.

See ACTION, 3; ATTORNEY AND CLIENT, 1, 4–6; CORPORATION, 2, 3; EQUITY, 2, 4; EVIDENCE, 17; FALSE REPRESENTATIONS; GUARDIAN AND WARD, 2; PURCHASER FOR VALUE, 2.

GAS.

See MASTER AND SERVANT, 7.

GOODS SOLD AND DELIVERED.

In a suit for the winding up of a partnership the appointment by this court, by agreement of the partners, of a person "to take possession and control of . . . all business and property of the firm, with authority and power to pay all bills for current expenses, for said fund, after said bills shall have been approved by both of said parties," is not the appointment of a receiver to whom only a person who had sold and delivered goods to the partnership, after the appointment, should look for payment; but even though the person so appointed should be considered as a receiver, having exclusive charge of the business, yet, in an action against the partnership for the price of the goods so sold and delivered, where the evidence showed that after the dissolution of the partnership one of the defendants ordered goods of the plaintiff, who had no notice of the dissolution, in the same manner as before, and assured the plaintiff that either one of the defendants was able to pay the bill, that the goods were at no time ordered by any one other than the defendants, and that the plaintiff understood he was selling to the partnership, it was proper for the presiding judge to submit to the jury the question whether the goods were purchased of the plaintiff by the receiver or by the defendants. *Robinson* v. *Hodgkins*, 465.

GUARANTY.

1. A. and B. executed an agreement, which recited that whereas A. held C.'s promissory note, and, as security for its payment, held also a mortgage given by D. to C. securing D.'s note, and A. had brought suit against C. on his note and attached his property, and, at B.'s request and for his benefit, had filed a petition in insolvency against C. and a bill in equity against C. and his grantee to set aside a certain conveyance, in consideration thereof B. guaranteed to A. the full payment, principal and interest, of C.'s debt to A., and also agreed to pay A. the legal expenses and charges which he had incurred, and to assume and pay all legal expenses and costs connected with the proceedings against C. above mentioned; and it was further agreed that B. should have the benefit of the security of A., and that B. should be entitled to an assignment of the security at

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any time on paying to A. the full amount of his claims against C. and of all disbursements and expenses incurred by him, and upon delivering to him an agreement to indemnify him from all costs and expenses in any way growing out of the legal proceedings above mentioned; and the agreement on A.'s part was made subject to the right of C. to pay the note and require a re-assignment of the security, or of the owners of the equity to pay the mortgage debt. *Held*, in an action by A. against B. on the agreement, that the performance of the guaranty by B. was dependent on the performance by A. of his agreement to assign the security; and that the security was both the mortgage and note given by D. to C. *Griggs* v. *Moore*, 354.

2. If B., relying upon the security, signs an agreement, guaranteeing to A. the payment of C.'s note, secured by D.'s mortgage and note, A. agreeing to assign the security to B. upon the performance of his undertaking, and if, at the time of signing, D. has been released by A. from his liability upon the note, and B. is ignorant of that fact, and it is not disclosed to him, and subsequently, having discovered it, he declines to pay C.'s note on the ground that D. has been so released, A. cannot maintain an action against him upon the guaranty; and B. is not bound to notify A. that he does not consider himself liable because D. has been released. *Ibid.*

See BOND, 2–4.

GUARDIAN AND WARD.

1. A guardian has no authority to withdraw from a bank funds due to his ward as administrator of an estate, and it is immaterial that at the time when the guardian withdrew the funds there were no known debts due from the estate, and that the ward was the sole distributee. Even if the time for proving debts has elapsed, the guardian cannot intermeddle with the estate, but is bound to wait until it is handed over to him by an administrator. *Ryan* v. *North End Savings Bank*, 215.
2. A ward who is the owner of a certificate of stock which his guardian has indorsed in blank and deposited for safe keeping in a bank, whence it is fraudulently abstracted by the cashier and pledged for his personal debt, is not estopped by the negligence of his guardian from reclaiming his certificate of stock from the person to whom it was pledged by the cashier of the bank. *O'Herron* v. *Gray*, 573.

See PLEDGE.

HEALTH.

See ANIMAL.

HEIRS.

See TRUST AND TRUSTEE, 1.

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HIGHWAY.

See CERTIORARI; COSTS; DAMAGES, 2; NEGLIGENCE, 9; NOTICE; SEWER; STREET RAILWAY.

HOMESTEAD.

See DEVISE AND LEGACY.

HUSBAND AND WIFE.

1. The Pub. Sts. c. 124, § 1, give a fee to an amount not exceeding five thousand dollars in value to a husband in his wife's lands, when they have had no children. *Howe* v. *Berry*, 418.
2. A husband, having paid the funeral expenses of his wife, who has left property, may recover them of her executor. *Morrissey* v. *Mulhern*, 412.
3. A husband is not liable for a dress furnished to his wife where it appears that, although they lived together, and that he paid all their household expenses, as well as some bills for her clothing contracted for in his name, the wife for a period of ten years had, out of her private income, paid for most of the clothing of herself and of her daughters, and where it does not appear that the husband had refused or neglected to provide the wife with suitable clothing, or that the dress in question, although suitable to her station in life, was necessary, or that credit was not given to her. *Dolan* v. *Brooks*, 350.
4. A husband may maintain an action against a railroad corporation for consequential damages, including the loss of consortium with his wife, arising from personal injuries occasioned to her by its negligence, although an action has been brought by her against the corporation for such injuries. *Kelley* v. *New York, New Haven, & Hartford Railroad*, 308.

See ALIMONY; BENEFICIARY ASSOCIATION, 3; DIVORCE; EQUITY, 2; EVIDENCE, 3; NOTICE; PARENT AND CHILD; WILL, 1.

IMPROVEMENTS.

See DAMAGES, 1.

INCOME.

See TRUST AND TRUSTEE, 4–6.

INDEMNITY.

See ADMISSIONS; BOND, 3, 4; CONTRACT, 9; GUARANTY.

INDICTMENT.

See ASSAULT; EVIDENCE, 21; EXCEPTIONS, 12; JURY; LAW AND FACT.

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INDORSEMENT.

See GUARDIAN AND WARD, 2; NEGOTIABLE INSTRUMENTS; PROMISSORY NOTE, 1–4.

INFANT.

See ACTION, 6; NEGLIGENCE, 8.

INJUNCTION.

See COVENANT; EQUITY, 4; TRADEMARK.

INSANITY.

See EVIDENCE, 17; WILL, 2.

INSOLVENT DEBTOR.

1. A petition to restrain the judge and register of insolvency from further proceedings relating to a proposal for composition under St. 1884, c. 236, cannot be maintained as a petition for a writ of prohibition; and as a petition under Pub. Sts. c. 157, § 15, the insolvent debtor is a necessary party. *Fairweather* v. *McKim*, 103.
2. The proper remedy in case of the refusal of a judge of insolvency to order a hearing on a proposal of a composition made by an insolvent debtor is by a bill or petition under Pub. Sts. c. 157, § 15, and not by mandamus. *Hill* v. *McKim*, 100.
3. *It seems*, that a judge of insolvency will not be compelled against his judgment to order a hearing on a proposal for composition so trifling in amount as under no circumstances "to be consistent with justice and for the interests of the creditors," within the meaning of St. 1884, c. 236, § 9. *Ibid.*
4. The provisions of Pub. Sts. c. 157, § 37, that upon entering an appeal from a decision of a judge of the Court of Insolvency disallowing a claim to the Superior Court, "the creditor shall file in court a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law," do not give him the right to file a declaration for a new cause of action, nor does he have under the other words of the section, "and like proceedings shall be thereupon had in the pleadings, trial, and determination of the cause as in an action at law commenced and prosecuted in the usual manner," any right to an amendment changing the cause of action which has been so brought up by appeal; and, while the cause remains in the Superior Court, it is competent for the justice before whom the case comes on for hearing to refuse to try the case on issues which have been, as matter of law apparent on the face of the record, erroneously allowed by another justice, without first changing the order allowing the amendment. *Holder* v. *Hillson*, 514.

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5. In Pub. Sts. c. 157, § 90, which provide that where a debtor has failed for certain reasons to obtain a discharge, a discharge may be granted if certain conditions therein stated are complied with, the words "a majority . . . of the creditors who have proved their claims" mean all the creditors who have proved at any time and not merely the creditors who have proved within six months after the date of the assignment. *Ruffin, petitioner*, 232.
6. If shares of stock are bought through a broker, to whom a part of the purchase price is paid as a margin, and he, having undertaken to carry the stock for the purchaser, fails so to do, and on demand is unable to deliver it, and the purchaser subsequently pays the balance of the purchase price, and, knowing or having reason to know that the broker is insolvent and that he has bought the stock in the market, receives from him the stock bargained for, which is then worth more than the sum paid by him, this transaction, to the extent of the excess of the value of the stock so delivered above the sum paid to the broker, is a preference in violation of Pub. Sts. c. 157, § 96. *Weston* v. *Jordan*, 401.
7. It is within the power of the Court of Insolvency, in the exercise of its discretion, to order the officers of an insolvent corporation to submit to an examination at any time. *Davis* v. *Bunker*, 82.

See DOMICIL; POOR DEBTOR, 1.

INSTRUCTIONS.

See CONTRACT, 8; DAMAGES, 4, 5; EXCEPTIONS, 6, 11; LIBEL, 5; MALICIOUS PROSECUTION; MASTER AND SERVANT, 2; WILL.

INSURANCE.

1. The act of a person who is engaged in negotiating insurance in domestic companies, but has no license as either agent or broker authorizing him to negotiate insurance in foreign companies, in aiding a duly licensed agent of a foreign insurance company to effect insurance on a life by furnishing information upon a contract for pay, is to be deemed the act of an insurance broker or an insurance agent within the meaning of St. 1887, c. 214, §§ 87, 93, and an action cannot be maintained thereon. *Pratt* v. *Burdon*, 596.
2. The production of a policy of life insurance by the administrator of the assured's estate, with testimony that it was found with other papers of the intestate in his desk immediately after his decease, is evidence, in an action upon the policy, that it had been delivered as a valid contract of existing insurance. *Jones* v. *New York Life Ins. Co.* 245.
3. A few days after a policy of life insurance, for which an application had been regularly made and signed, was issued, another policy was issued by the same company to the same person, upon which the following words were stamped: "This policy is issued and accepted for two thousand dollars additional insurance, based upon the terms of the application on

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which" the first policy "was issued, and said application is hereby made a part of this contract." *Held*, in an action on the second policy, that the provision quoted was a part of the contract to be considered with the rest of the policy, and if the defendant delivered the policy in this form as a completed contract, waiving the signing of another application, and received the premium, the contract was binding. *Jones* v. *New York Life Ins. Co.* 245.

4. In an action upon a policy of life insurance, the defendant is not entitled to a ruling that "on the evidence the policy in suit would not be a valid policy of existing insurance, unless accepted by the signature of the insured to the application and the forwarding of a check for the premium or the payment of the premium otherwise," if there is evidence which will warrant a finding that the defendant's agent waived an immediate payment of the premium in cash and delivered the policy on the promise of the assured to pay in the future. *Ibid.*

5. Where the insurance upon property subject to a mortgage is payable in case of loss to the mortgagee "as its interest shall appear," the interest of the mortgagee covered by the policy is that existing at its date, and not under subsequent mortgages in force at the date of the loss. *Attleborough Savings Bank* v. *Security Ins. Co.* 147.

6. If the mortgagee of property, to whom a policy of insurance thereon is made payable in case of loss as his interest shall appear, has become unable, by his own act, to comply with the terms of the provision in the policy for subrogation, he cannot maintain an action on the policy. *Ibid.*

See ASSIGNMENT, 1–3; BENEFICIARY ASSOCIATION, 4, 5; EVIDENCE, 3, 4, 11; PURCHASER FOR VALUE, 1.

INTEREST.

See TRUST AND TRUSTEE, 6.

INTERPLEADER.

See ASSIGNMENT, 3.

INTOXICATING LIQUORS.

If a wholesale dealer in intoxicating liquors in this Commonwealth is accustomed to sell liquors to retail dealers in another State, the statutes of which prohibit the sale of such liquors except by town agents, in an action by him for the price of liquors sold, through an agent residing in that State, to a person entering into the liquor business there, it is competent for the judge, sitting without a jury, to find that both the plaintiff and his agent knew of the prohibitory law of the other State and that the defendant was not a town agent; and to infer that the plaintiff knew that the defendant intended to sell the liquors illegally, and that the plaintiff sold the liquors with a view to such resale by the defendant. *Wasserbochr* v. *Morgan*, 291.

See EVIDENCE, 22.

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JOINT TENANTS.

See DEVISE AND LEGACY.

JUDGE.

See AMENDMENT; ATTORNEY AT LAW, 4–6; CONVERSION; DAMAGES, 4, 5; DIVORCE, 3; EXCEPTIONS, 6, 10, 11; GOODS SOLD AND DELIVERED; INSOLVENT DEBTOR, 1–4; INTOXICATING LIQUORS; LIBEL, 5; MALICIOUS PROSECUTION; PROMISSORY NOTE, 2; TRIAL; WRIT OF ERROR.

JUDGMENT.

Under St. 1895, c. 234, entitled "An Act relative to the vacation of judgments and writs of and petitions for review," the petitioner cannot require the respondent to file an answer. *Hastings* v. *Parker*, 445.

See ACTION, 4; BOND, 1; ESTOPPEL, 1; EXCEPTIONS, 4; EXECUTION; LIMITATIONS, STATUTE OF, 1; MANDAMUS; SUPERIOR COURT.

JURISDICTION.

See APPEAL; ARREST, 1; EQUITY, 1; INSOLVENT DEBTOR, 7; PROBATE COURT; REMOVAL OF SUITS; SHIPS AND SHIPPING, 1.

JURY.

The jury in a criminal case are absolutely free to believe what is unfavorable to the defendant in his statement, and to disbelieve all that is favorable, if the character of the statement has that effect upon their minds. *Commonwealth* v. *Hunton*, 130.

See CONTRACT, 8; DAMAGES, 4, 5; EMPLOYERS' LIABILITY ACT, 2, 4, 6; EXCEPTIONS, 9–11; FORCIBLE ENTRY AND DETAINER, 2; GOODS SOLD AND DELIVERED; LAW AND FACT; LIBEL, 2–5; MALICIOUS PROSECUTION; MASTER AND SERVANT, 2, 4, 14, 20; MECHANIC'S LIEN, 3; NEGLIGENCE, 3, 4–8, 12; PARTIES; VERDICT; WILL.

LACHES.

See ESTATES OF PERSONS DECEASED, 2.

LAND DAMAGES.

See CAPE COD SHIP CANAL, 2; COSTS; EVIDENCE, 9–13, 23; PARTIES

LANDLORD AND TENANT.

An action may be maintained against the owner of a tenement house, having a cellar staircase used in common by all the tenants, for injuries sustained

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in consequence of the stairs giving way as a tenant was passing over them, the probable cause of which was that a contractor employed by the landlord to deepen the cellar had removed the earth which supported the staircase; and the plaintiff's assent to the question, on cross-examination, "Did not exercise the slightest care?" does not warrant the conclusion, as matter of law, that he was negligent. *Robbins* v. *Atkins*, 45.

See ACTION, 5; EXCEPTIONS, 8; NEGLIGENCE, 13; TENANT AT WILL.

LAPSE.

See PUBLIC CHARITY, 4.

LARCENY.

See ASSAULT.

LAW AND FACT.

A., who was a member of a committee of the common council of a city which had power to buy horses, bought several horses for himself; and B. was notified that A. had some horses. On a certain day a meeting of the committee was called in the absence of the chairman and contrary to his request, and the committee left the city hall for supper and continued their meeting at a hotel, where they appointed a sub-committee, of which A. was a member, to buy horses. On the next day A. sold his horses to B., the horses being left in the stable where A. was keeping them; and on the following day the sub-committee, including A., bought the horses of B. for the city at $200 apiece. A. was unwilling to disclose the prices paid by him for the horses, but they averaged about $100. Both A. and B. refused to testify before an investigating committee as to the price paid by B. to A. for the horses, and the notes given for the price, when produced, had their figures cut out. B. testified before the investigating committee, that, at the time of his purchase, he talked with A. about selling the horses to the city; but A. did not admit this. *Held*, at the trial of an indictment under Pub. Sts. c. 205, § 12, against A. and B., charging a conspiracy for the sale of the horses to the city, that the case was rightly submitted to the jury. *Commonwealth* v. *Hunton*, 130.

See EMPLOYERS' LIABILITY ACT, 2, 4; EXCEPTIONS, 5; LANDLORD AND TENANT; MASTER AND SERVANT, 4, 14; MECHANIC'S LIEN, 3; NEGLIGENCE, 4, 7; POWER, 2.

LEASE.

See ACTION, 5; CONTRACT, 9; CORPORATION, 1, 2; FORCIBLE ENTRY AND DETAINER.

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LEGACY.

See DEVISE AND LEGACY.

LEX LOCI.

See BENEFICIARY ASSOCIATION, 4; CONFLICT OF LAWS.

LIBEL.

1. An article in a city newspaper contained a picture of B., a practising physician, together with a sensational title and head lines, and the statement, copied from a newspaper published in another city, that B., one of the organizers of a certain social club, "had also succumbed to the enticing charms of Caterer C.'s pretty wife, and that, as a result, Mrs. B. was about to bring proceedings for a divorce, in which she would name the pretty Mrs. C. as co-respondent." This was followed by an account of separate interviews with B. and his wife, in which each denied the truth of the story, and concluded with a tribute to B.'s professional and social standing in the community. *Held*, in an action by B. against the publisher of the newspaper, that the article was libellous. *Bishop* v. *Journal Newspaper Co.* 327.
2. The fact that a libel may not be believed does not excuse the person who publishes it, nor deprive the plaintiff, in an action for its publication, of all except nominal damages; but it is for the jury to determine the damages. *Ibid.*
3. Whether the natural consequences of the publication of a libel are of a character to entitle the plaintiff, in an action therefor, to substantial damages or only to nominal damages, is for the jury to decide. *Ibid.*
4. The defendant in an action for libel is not entitled to a ruling that, "if the jury find that the article taken as a whole injured the plaintiff in his feelings and character, but find that the injury was slight, they may award nominal damages; and if they find that the defendant has only just overstepped the line, and that the action should not have been brought, then the damages must be nominal." *Ibid.*
5. At the trial of an action by B., a physician, for libel, the judge instructed the jury upon the question of damages, among other things, as follows: "Now I think this is a good case to submit to twelve men in Suffolk County, to say what damages a plaintiff shall have who has been treated as Dr. B. has. Has he been injured, or has the defendant pursued a proper and justifiable course in which to treat a citizen who is a man of good character, and where the defendant does not set up the truth? . . . You are to take into consideration that the defendant had published what was published in N. Y., that the article was not true, so that when the defendant published this article it had not only the fact that Mrs. B., but that Dr. B. also, denied that there was any truth in that accusation. But still the defendant published it with their denial." *Held*, that the instructions did not tend unduly to bias and influence the jury. *Ibid.*

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LICENSE.

See CONTRACT, 7; EVIDENCE, 2; INSURANCE, 1; NEGLIGENCE, 10–13; PETROLEUM.

LIEN.

See MECHANIC'S LIEN.

LIFE ESTATE.

See POWER, 2.

LIFE INSURANCE.

See ASSIGNMENT, 1–3; BENEFICIARY ASSOCIATION, 4, 5; EVIDENCE, 3, 4; INSURANCE, 1–4.

LIMITATIONS, STATUTE OF.

1. An action upon a judgment rendered by a trial justice is barred by the statute of limitations, Pub. Sts. c. 197, § 1, cl. 1, if brought after six years from the date of the judgment. *Mead* v. *Bowker*, 284.
2. If, more than six years after the sum secured by a mortgage given without a note is due and unpaid, the mortgagee discharges the mortgage and acknowledges satisfaction of the debt secured by it, at the mortgagor's request and upon his oral promise to pay to the mortgagee the amount of the debt and interest if he would execute such discharge, the transaction is not a new promise to pay the old debt, within the meaning of the statute of limitations, Pub. Sts. c. 197, § 15, but it is a contract for a valuable consideration outside of the statute upon which an action may be maintained. *Devine* v. *Murphy*, 249.
3. An account stated gives a new and original cause of action, and the statute of limitations begins to run only from its date. *King* v. *Davis*, 133.
4. A writing was signed by the debtor underneath a statement of the mutual accounts of the debtor and creditor in these words: "The above statement is correct, and I owe the balance as above due. J. M. D. June 13, 1887." *Held*, that this was a sufficient acknowledgment to take the debt out of the statute of limitations. *Ibid.*
5. On April 8, 1895, A.'s attorney wrote B. that a bill for a certain amount of A. against B. had been placed in his hands for collection. On April 11, B. replied, "Your letter received and wish to say that I cannot pay it, and I don't know when I can." B.'s letter stated further the work he was doing, and the amount which he regarded as due on the bill. *Held*, that B.'s letter did not waive the bar of the statute of limitations. *Wald* v. *Arnold*, 134.

See ACTION, 5; CAPE COD SHIP CANAL, 2.

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LORD'S DAY.

See CONTRACT, 7.

MAIL.

See BENEFICIARY ASSOCIATION, 5; EVIDENCE, 1.

MALICIOUS PROSECUTION.

1. At the trial of an action for the malicious prosecution of the plaintiff on a criminal charge, the judge, in effect, instructed the jury that, if they found that the defendant in instituting the prosecution acted with the care and prudence which would have been exercised by a reasonable and ordinarily prudent person under like circumstances, they should then find that there was probable cause, and the defendant would not be liable. *Held*, that the defendant had no ground of exception. *Ellis* v. *Simonds*, 316.
2. At the trial of an action for the malicious prosecution of the plaintiff on a criminal charge, the judge instructed the jury that malice might be inferred from the want of probable cause, and told them what would and what would not constitute malice and probable cause, but did not instruct them that want of probable cause could not be inferred from malice. *Held*, that it was to be presumed that the jury followed the instructions given, instead of drawing inferences about which nothing had been said, and that the defendant had no ground of exception. *Ibid.*
3. At the trial of an action for malicious prosecution, the defendant has no ground of exception to remarks of the judge to the jury by way of illustration or definition of probable cause and malice, where he expressly cautions them that it is for them to say how the questions which he suggests are to be answered, and that they are not to infer, from the manner in which the questions are stated, that one answer or another is to be given. *Ibid.*

MANDAMUS.

When it appears of record that one of two judgment debtors has been arrested on execution, and, having entered into a recognizance, has made default, mandamus will lie to the clerk of the court issuing the execution upon his refusal to issue an alias execution against the person and property of the other judgment debtor. *Thomson* v. *Sleeper*, 373.

See INSOLVENT DEBTOR, 2.

MANSLAUGHTER.

See TRIAL, 2, 3.

MARINE INSURANCE.

See PURCHASER FOR VALUE, 1.

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MARRIAGE.

See ALIMONY.

MARRIED WOMAN.

See HUSBAND AND WIFE; RECOGNIZANCE, 1.

MASTER AND SERVANT.

1. If an implement, the breaking of which is attended with danger, breaks in the proper use of it for the purpose for which it was designed, this is some evidence, in an action for personal injuries occasioned to an employee by the breaking, that the implement was defective in the sense that at the time it was not safe or suitable for the use to which it was put. *Coleman* v. *Mechanics' Iron Foundry Co.* 254.
2. In an action for personal injuries occasioned to the plaintiff by the flying apart of the cylinder of a dusting machine in use in the mill where he was employed, he has no ground of exception to an instruction to the jury that the procuring of machinery by mill-owners of a reputable maker meets the standard of ordinary care, and that it is not negligence on the part of an employer to place in his mill, and, after proper inspection, to use, machinery so bought. *Reynolds* v. *Merchants' Woolen Co.* 501.
3. An action cannot be maintained against a railroad corporation for causing the death of a conductor of a freight train in its employ, in consequence of the breaking apart of the train owing to a defective link, in the absence of evidence that the corporation failed to supply all the links that were needed for coupling the cars at the place where the train was made up. *Young* v. *Boston & Maine Railroad*, 219.
4. If the superintendent of a gang of men employed by a city in digging a trench for water pipes uses a tripod instead of a derrick in hoisting a very heavy stone out of the trench, and does not have planks put across the trench under the stone after it has been hoisted above the surface of the ground, so that when the men, under his direction, are engaged in swinging the stone for the purpose of placing it on the ground, the tripod and the stone fall into the trench, carrying with them one of the men who is engaged in steadying a leg of the tripod, and injuring him, in an action against the city for his injury, it cannot be ruled, as matter of law, that the falling of the tripod into the trench was an ordinary risk of his employment, but the question whether he assumed the risk is for the jury. *Powers* v. *Fall River*, 60.
5. An action cannot be maintained, either at common law or under the employers' liability act, St. 1887, c. 270, for injuries caused by a piece of iron falling upon the plaintiff's head from the ceiling of the engine room in the defendant's factory, where a fly wheel had exploded, the plaintiff having been sent into the room by the defendant's superintendent to clear out the rubbish after the explosion. *Kanz* v. *Page*, 217.

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6. At the trial of an action for personal injuries received by the plaintiff in consequence of the breaking of a ladder on which he was standing while painting the outside of a house, there was evidence that the plaintiff and two fellow workmen selected from a lot of ladders furnished by their employer for the job two ladders about twenty-two feet and twelve feet long respectively, and, splicing them together, placed them against the side of the house so that while the foot of the ladders stood about twelve feet from the house the upper end rested against it just beneath the coving; that the ladder which broke was painted, and contained no apparent defects; and that the plaintiff, though expressing doubts as to the strength of the ladders, was assured of their strength by one of his fellow workmen. It did not appear that the defendant was present when the men were at work, and there was no evidence of a defect in the ladder except the fact that it broke, and the testimony of witnesses that a sound ladder would not have broken under those conditions, nor did it appear that the ladder was too small, or that it was made of unsuitable materials, or that the side pieces were rotten or otherwise defective. *Held*, that an action could not be maintained either at common law or under the employers' liability act, St. 1887, c. 270. *McKay* v. *Hand*, 270.
7. At the trial of an action against a gas light company for personal injuries to the plaintiff, while in its employ, caused by the caving in of the sides of the trench in which the plaintiff was at work, there was evidence that the trench had been dug four days previously by a city in one of its streets, and that although the earth in that vicinity was constantly shaken by the moving of trains and heavy teams, and although the trench was six feet wide and of about the same depth, having earth thrown up on either side to an additional height of eighteen inches, it had not been shored or braced; that by the digging of the trench, over which the defendant had no control, its gas pipe had been exposed, and that, pursuant to orders from the city to remove such pipe from the trench, it set the plaintiff to removing it; that the plaintiff had had two or three years' experience in digging trenches; and that the accident happened after he had been at work three hours, and just after the defendant's superintendent had left the trench. *Held*, that the plaintiff was not entitled to recover, either at common law or under the employers' liability act, St. 1887, c. 270, and that evidence offered by him that he made no examination of the trench, but relied on the defendant's superintendent to provide for his safety, was properly excluded. *Hughes* v. *Malden & Melrose Gas Light Co.* 395.
8. An employee, thirty years of age and of ordinary intelligence, who knows nothing of the dangers of the machine upon which he is working and who is not familiar with machinery, cannot recover of his employer for injuries occasioned to his hand by being caught in revolving cog wheels, if the employer had a right to assume that the employee had that knowledge which is acquired by common experience, and was under no obligation to warn him that if he put his hand between the wheels he would be hurt; and the fact that his employer told him to work "quick" cannot be regarded as evidence of negligence. *Ruchinsky* v. *French*, 68.
9. If an employee of a railroad corporation, while getting down from the top

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of a car by a side ladder in the discharge of his duty, is injured by coming in contact with one of the iron pillars of a bridge over the track, the pillar being about four feet from the track, he cannot recover in an action against the corporation for his injuries if he was an experienced hand, and knew that the bridge was there, and that cars might have only side and no end ladders. *Bell* v. *New York, New Haven, & Hartford Railroad*, 443.

10. A workman, who has been employed in different capacities for several months by a contractor who has a track on which he runs cars by means of a locomotive engine, cannot maintain an action for injuries occasioned, while he was trying to block the wheels of the engine, by falling and catching his glove on a spike which projected two or three inches from one of the sleepers just inside the track, if it appears that he was familiar with the work he was called upon to do, that he knew the danger of slipping if he failed to block the wheel, and that he knew that the sleepers were second-hand sleepers and he had seen spikes in some of them while the sleepers were in piles; and it is immaterial that he did not know of the particular spike which caused the injury. *O'Neil* v. *Keyes*, 517.

11. At the trial of an action for personal injuries received by the plaintiff while in the employ of the defendant, in consequence of having his clothing caught in a pulley and belt on a machine by which he was standing while working on another machine, there was evidence that, when injured, the plaintiff, who was an adult, had been employed for about two months as a spinner in the defendant's cordage factory, previous to which for four years he had been so employed, on machines of substantially similar character and operation, in another cordage factory; that, when injured, he was standing in a narrow passage between two machines, from one of which he was removing a bobbin; and that, before he had begun to work for the defendant, he had questioned the safety of this passage, but was assured by the defendant's superintendent of the safety both of the passage and of the machinery. The plaintiff testified that he worked every working day on the same machine by which he was injured during the whole period of his employment; that he knew the belt was there; that he had seen it and the pulley; that when he stepped into the passage he knew that the machine behind him was running; and that there was nothing about the belt and the pulleys which he could not have seen had he looked. *Held*, that the plaintiff assumed an obvious risk, and that the action could not be maintained. *Kenney* v. *Hingham Cordage Co.* 278.

12. In determining whether the risks of an employment are so obvious as to be assumed by an employee, the question is not whether the employee has actually observed, and by a conscious act of the will assumed, all of the risks involved, but whether such risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, having regard to the age, intelligence, and experience of the employee, he could have seen and understood had he looked for them, and such as, having seen, he must have appreciated. *Ibid.*

13. An employee who, while engaged in removing a kettle full of melted sugar from a furnace, is injured by the sugar spilling upon his hands

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while he is trying to disengage himself from a ring of the furnace which has clung to the kettle and then fallen to the floor, cannot maintain an action for his injuries, if the risk was obvious, the elements of danger were known by him, and he was lacking in due care either in failing to take notice that the ring might come off with the kettle, or that in point of fact it had so come off in this instance. *Barnard* v. *Schrafft*, 211.

14. At the trial of an action for personal injuries received by the plaintiff while in the employ of the defendant, there was evidence tending to show that the plaintiff, who had been employed for three or four months prior to the accident in moulding lead, was set to work melting dross, and that while pouring damp dross into a kettle of molten lead the kettle exploded and injured him. There was testimony on the part of the defendant that the plaintiff had been warned of the danger arising from the contact of dampness with molten lead, but the plaintiff denied that he had ever received any such warning. There was also testimony that the plaintiff had been instructed by another workman to pour the dross slowly from the kegs where it was stored into a box, and from the box into the kettle, and to spread his hands out over the dross as it was running from one receptacle into the other, instead of which the plaintiff poured the dross from the box at the moment of the explosion all at once, in a lump, and not slowly. This was not contradicted by the plaintiff, who did not testify in denial of the instructions as to pouring slowly and spreading his hands over the dross, but testified that he poured the dross in the manner he was instructed to. *Held*, that the risk was not of a character so obvious that the plaintiff must be taken to have assumed it; and that there was evidence in the case which the judge erroneously withdrew from the consideration of the jury. *Redmund* v. *Butler*, 367.

15. At the trial of an action for personal injuries, it appeared that the plaintiff was employed to pilot the defendant's steamship from Boston to Gay Head; that at about midnight on the first day out, the weather being cold and stormy and the plaintiff, having occupied for a long time an exposed situation on the bridge of the vessel, was invited by one of the ship's officers to go into the chart room, just behind the bridge, for warmth and shelter; that the room, which was small, contained two portholes and two small ventilators, and a door opening on the deck so arranged as to be fastened open; that it was heated by a stove which was not provided with a smoke pipe to the outer air, and in which a patent fuel was burned; that when he first went to the chart room one of the officers of the vessel cautioned him to keep the door hasped back and there would be no danger from the fumes of the stove; that, although he on coming aboard the vessel had had a state room assigned to him, he used it but once, and from time to time, while navigating the vessel, went into the chart room, but always kept the door open; and that while so occupying the chart room on the second day out he fell asleep on a lounge, and rolled from it to the floor and against the stove, in consequence of which he was severely burned and rendered unconscious for a long time from the fumes of the stove. *Held*, that the defendant owed the plaintiff no duty to change the construction of its chart room or of the stove by which it was heated; that the plaintiff

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assumed the risk of the accident; and that the action could not be maintained. *Murch* v. *Thomas Wilson's Sons & Co.* 408.

16. A., who was employed in repairing a high bridge crossing a river and having railroad tracks laid upon it, was obliged, while going back and forth between his work and his boarding place, to walk upon one of the tracks, which was given up by the railroad corporation to his employer for his use in repairing the bridge, the other track being used for trains. A. entered upon the bridge, in returning from his dinner to his work, and, as a freight train was passing by his side on the other track, a derrick car in use about the work came up behind him, moving at the rate of twelve miles an hour, and he started to run as fast as he could toward the end of the bridge, where his work was, and nearly reached it when the car overtook him and injured him. The only other thing that he could have done was to get down between the ties and climb upon the timbers composing the frame of the bridge and hold on there while the car passed him. *Held*, in an action by him against his employer for his injury, that there was evidence that he was in the exercise of due care. *Olsen* v. *Andrews*, 261.

17. It is not evidence of negligence on the part of an employer, engaged in repairing a bridge over a river, in failing to provide for his employee some mode of going back and forth between his work and his boarding house other than by walking on the railroad track laid upon the bridge, nor in failing to furnish a different kind of derrick car from that in use about the work when the latter entered the service, and which injures him, if, so far as appears, the car is suitable for the use for which it is intended; but the use of the car and the necessity of passing over the bridge create obvious risks connected with the business in which he is engaged. *Ibid.*

18. A servant, who, in going back and forth between his work and his boarding house, is obliged to walk on a railroad track laid upon a bridge over a river which he is employed in repairing, and is injured while returning to his work at noon by being struck by a derrick car in use about the work, is in his master's service, and a fellow servant with the engineer of the car at the time of the accident. *Ibid.*

19. In an action for personal injuries occasioned to the plaintiff while employed by the defendant, — who was engaged in repairing a bridge crossing a river and having railroad tracks laid upon it, — by being run over by a derrick car in use about the work, the foreman testified that when the men were being selected by A., who was the defendant's agent, to work upon this bridge, the witness objected to the engineer, and said that he did not like the way in which he handled the derrick car; that upon several previous occasions, when they were working in another place, the witness told A. that he did not like the way the engineer was working the derrick car, that he was handling it nervously, and that the witness was afraid of it, that "he was nervous and foolish, and might run over somebody," that "he was liable to run over some man if he did not take him away," and described in his testimony what nervousness he observed on the part of the engineer when running the car; and that A. replied, "It don't take much of a man to run a derrick car; anybody can run it."

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Held, that there was evidence of negligence on the part of the defendant in retaining in his service an incompetent servant. *Olsen* v. *Andrews*, 261.

20. Although specific acts of negligence are not admissible to show the incompetency of a servant, when the conduct of a fellow servant of the plaintiff tending to show his qualifications or his mental or physical fitness or unfitness for his work is properly before the jury upon one of the issues of the case, they may consider it on the question of his competency. *Ibid.*

See ACTION, 7, 8; EMPLOYERS' LIABILITY ACT; EVIDENCE, 7; EXCEPTIONS, 9; NEGLIGENCE, 2, 11, 12.

MASTER IN CHANCERY.

If a master's report shows that the evidence was reported to the court at the plaintiff's request, in accordance with the rule which authorized the master "to find the facts and report the evidence so far as requested by either party," a motion by the plaintiff to recommit the report, with instructions to the master to report only the evidence upon which he based his findings, and such other evidence taken before him as either party might request, is properly overruled. *Safford* v. *Old Colony Railroad*, 492.

See EQUITY, 6–9; ESTOPPEL, 2; SUPREME JUDICIAL COURT, 1.

MECHANIC'S LIEN.

1. A lien may be maintained by an architect, under Pub. Sts. c. 191, § 1, for labor performed by him in the supervision of the erection of a building, but not for the preparation of plans and specifications therefor. *Mitchell* v. *Packard*, 467.

2. Under Pub. Sts. c. 191, § 20, it is within the power of the Superior Court to allow an amendment of a petition to enforce a mechanic's lien, by changing the allegation of a contract for labor and materials to one for labor only. *Dodge* v. *Hall*, 435.

3. The sufficiency of the description of the land in a petition to enforce a mechanic's lien thereon is rightly left to the jury, and a description is sufficient which will enable one who is familiar with the locality to identify the land with reasonable certainty; and inaccuracies will not vitiate the lien if the land can be so identified. *Ibid.*

4. Where a petition to enforce a mechanic's lien alleges, just preceding the description of the land, that the land was owned by A. and B. when the labor was furnished, while it is an undisputed fact that they were never joint owners of the land, if this is treated as a matter of description, it is merely an inaccuracy which is not fatal. *Ibid.*

5. If the labor for which a mechanic's lien is sought to be enforced is performed and furnished under a contract with the owner of the land when the contract is made, by the terms of which he employs the petitioner generally to perform and furnish the labor necessary for the construction of the house on the land, and promises to pay him a fair and reasonable

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price therefor, a conveyance of the land by the owner while the work is going on will not defeat the lien, but it will continue until all that is called for by the contract has been done. *Dodge* v. *Hall*, 485.

6. The sills of a house rested on eighteen cedar posts driven from twenty-four to thirty inches into the ground and cut off about four feet above the ground, and were cornered and spiked together with wire nails about four inches in length, and were also fastened to the posts by long wire nails. The chimney was set eighteen inches into the ground and extended up through the house, which was not plastered to the chimney. There was no cellar under the house; and part only of the turf under the house was removed. *Held*, upon a petition to enforce a mechanic's lien, that the house was real estate. *Ibid.*

7. The description of land, in a petition to enforce a mechanic's lien thereon, as bounded on G. Street, will be satisfied, to a reasonable intent, by proof that the street is known as G. Street, whether that is the true name of the street or not. *Ibid.*

8. At the trial of a petition to enforce a mechanic's lien, it appeared that the petitioner was under a general contract for service with the prior contractor, and began to work under it upon the respondent's house before a mortgage thereon was recorded; that he continued such work regularly until the house was ready for plastering, when he was ordered by his employer to work on a house on an adjacent lot and elsewhere; that on his order he returned to work on the respondent's house; and that there was nothing to indicate at any time any change in his contract in reference to the house until he finally ceased to work upon it. *Held*, that the interruption of the petitioner's work was temporary, that the work itself was done under the same contract, not only in reference to his relations to his employer, but also in reference to his relation to the building, and that his lien took precedence of the mortgage. *Savoy* v. *Dudley*, 538.

MINOR.

See ACTION, 6; NEGLIGENCE, 3.

MISTAKE.

See EQUITY, 2.

MONEY HAD AND RECEIVED.

It is no defence to an action for money had and received by a commission merchant, from the sale of merchandise forwarded to him in the ordinary course of business, that he had some reason to suspect that it belonged to the L. Co., which did business in the former year and sent similar merchandise to him from the same place from which the plaintiff's merchandise was sent; that the accompanying drafts were made payable to the same person in whose favor drafts were drawn the year before by the L. Co., and were in the same handwriting; that the mark on the merchandise

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to designate the consignee indicated a succession to the rights of the L. Co., because, as against the proprietorship truly asserted by the plaintiff's business name in which the merchandise was sent, it had no tendency to contradict the plaintiff's claim of title; that the defendant heard from commercial agencies and from those in the vicinity of the place from which the merchandise was sent that the business was being there carried on in the same manner and by the same parties as in 1889; and that there was a usage for persons whose merchandise of this particular kind did not sell well to change their business name and conceal their identity to mislead the public and avoid the consequences of a bad reputation. *Tucker* v. *Utley*, 415.

MORTGAGE.

1. There is no absolute rule of law that, when the first advertisement of a sale of land under a power in a mortgage fails to bring any one to the sale, it is the mortgagee's duty to advertise again as fully as before. *Marcus* v. *Collamore*, 56.
2. It is no objection to the validity of a sale of land under a power in a mortgage, that the auctioneer, who saw no one present at the place appointed for the sale, although one person was present in fact, adjourned the sale without reading the advertisement or making a proclamation, especially if, before the sale took place, the fact of such adjournment was published. *Ibid.*
3. At the hearing of a bill in equity to set aside a sale of land under a power in a mortgage, the judge found that there was a breach of condition; that the requirements of the mortgage as to advertisement were fulfilled; that all the proceedings were conducted and the purchase made in good faith; that adjournments of the sale were reasonable, and did not prejudice the plaintiff; that the mortgagee made reasonable efforts to procure and did procure the attendance of *bona fide* bidders; that there was a greater attendance than usual at such sales, and several persons bid; and that, although the property sold for less than its market value, that might have been due to pending litigation. *Held*, that, in view of these findings this court could not disturb the sale. *Ibid.*

See Action, 3, 4; Assignment, 3; Corporation, 8; Covenant; Forcible Entry and Detainer, 1; Guaranty; Insurance, 5, 6; Limitations, Statute of, 2; Mechanic's Lien, 8; Priority; Purchaser for Value, 2; Redemption; Title.

MOTION TO DISMISS.

See Appeal; Exceptions, 4.

MUNICIPAL CORPORATION.

See Animal; Assignment, 4; Contract, 3; Damages, 2; Evidence 9–13, 21, 22; Intoxicating Liquors; Law and Fact; Notice; Sewer; Town.

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MURDER.

See TRIAL, 8.

NAME.

See TRADEMARK.

NECESSARIES.

See HUSBAND AND WIFE, 3.

NEGLIGENCE.

1. If a person puts his head into an elevator well for the purpose of shouting up the shaft for the car to come down, and it does come down and strikes him, an action for the injuries occasioned thereby cannot be maintained. *Ramsdell* v. *Jordan*, 505.
2. In an action for injuries to the plaintiff's person and bicycle, a demurrer to a declaration which alleges that, on a certain day while riding his bicycle on M. Street in the city of C., in the exercise of due care, he was run over by the defendant's horses and carriage, negligently driven by a servant of the defendant while acting in the scope of his employment, and was severely injured and his bicycle was demolished, is properly overruled. *Braithwaite* v. *Hall*, 38.
3. At the trial of an action against a street railway company for personal injuries sustained by the plaintiff in consequence of being run over by one of the defendant's cars, evidence that the car was moving very rapidly through a much frequented street of a city; that the gong was not sounded; that the plaintiff, who was nearly nine years of age, with a companion who was of about the same age, before starting to cross the street looked both ways to see if a car was approaching, and, seeing none, was crossing the street slowly when the defendant's car came upon, struck, and ran over her, is competent to be considered by the jury on the question of due care of the plaintiff and negligence on the part of the defendant. *Rosenberg* v. *West End Street Railway*, 561.
4. At the trial of an action against a street railway company for causing the death of a motorman, it appeared that when the electric car upon which he was employed had reached its destination the conductor went to the other end, shifted the trolley and pushed in the fender, and that the motorman took off the motor handles and gong tapper and went to the end which was now the front of the car, and was seen to stoop down and take hold of the fender. Shortly after the car started, and he was caught under the wheels and fatally injured. The cause of the starting was wholly uncertain. *Held*, that the case was rightly taken from the jury. *Kenneson* v. *West End Street Railway*, 1.
5. At the trial of an action for personal injuries received by the plaintiff when alighting from a street car of the defendant, evidence tending to

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show that the car was a short, closed car, containing about fifty passengers, some of whom were standing on the rear platform; that when it was approaching a place where it always stopped without the ringing of the bell, a passenger on the rear platform rang the bell, and when the car stopped the conductor, who was inside collecting fares, called the name of the street, and nodded his head to the plaintiff, who had indicated his desire to alight there; that passengers arose to go out, of whom the plaintiff, who was of advanced age and stout, was perhaps the last; and that, as he was in the act of stepping from the platform to the ground, the passenger standing on the rear platform, without authority from the conductor, rang the bell for the car to start, the car started suddenly, and the plaintiff was thrown to the ground and injured, — is competent to be considered by the jury on the question of negligence. *Nichols* v. *Lynn & Boston Railroad*, 528.

6. In an action against a railroad corporation for personal injuries occasioned to the plaintiff by slipping upon an accumulation of snow and ice on a step of one of the defendant's cars, which was part of a train that had run from R. to B., a distance of thirty-five miles, there was evidence of a snow storm which lasted all day in S., about midway between R. and B., and most of the day in B.; that it stopped snowing in B. at nine o'clock in the evening, and was not snowing in S. a little over half an hour later when the plaintiff took the train there for B., where the accident occurred as he was leaving the train; and that the snow was hard, as if it had been there some time. *Held*, that the jury were warranted in finding that the snow and ice were on the steps of the car before it left R., and that the defendant was liable for not having cleared the step. *Gilman* v. *Boston & Maine Railroad*, 454.

7. The question whether a passenger was in the exercise of due care in leaving a railway car, the step of which was covered with an accumulation of snow and ice, upon which she fell and was injured, and who testifies, in an action for her injury, that she saw the condition of the step and fell just as her daughter, who preceded her, warned her, is for the jury. *Ibid.*

8. At the trial of an action against a railway company, under Pub. Sts. c. 112, § 212, for causing the death of the plaintiff's intestate, a passenger, by the gross negligence of the defendant's servants, there was evidence tending to show that he had just gone up the steps and reached the platform of a car when the train of which the car was a part, and which had been delayed by snow, was run into by a later train, and the intestate was thrown off and killed. His general practice was to travel by a street railway, and it was contended that it was as likely that he was crossing the platform on his way to the electric cars as that he intended to go by steam, and it did not appear that he had a ticket or the money to pay for one. No electric cars were running at the time because of the snow storm. There was testimony that the street railway could be seen from the intestate's house, and that less than a quarter of an hour before the accident he looked out in the way he always did to see if the electric cars were there, and then left in a hurry, saying that he was going to take the train, as there were no electric cars running. The judge directed a verdict for the defendant. *Held*, that the intestate's statement was admis-

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sible, that he was a passenger, and that the case should have been submitted to the jury. *Inness* v. *Boston, Revere Beach, & Lynn Railroad*, 433.

9. If, while a person is waiting upon the platform of a railroad station to take a train for which he has a ticket, a runaway horse comes along a public street which crosses the railroad at grade close by the station and has gates lowered on each side of the track, the train having just come in, and breaks through the first gate, stops a little at the second, turns towards the station, passes between the locomotive engine and a telegraph post, a space not over four feet in width, and comes upon the platform, throwing down and injuring the person, he cannot maintain an action against the railroad corporation for his injury. The failure of the gate-tenders to catch hold of and stop the horse is not evidence of negligence which is entitled to be considered; and evidence of the condition of the gate at the time of the accident, or several months earlier, when a horse, not a runaway, was alleged to have pushed it aside by pressing against it, is immaterial. *Brooks* v. *Old Colony Railroad*, 164.

10. An action may be maintained against a railroad corporation for injuries sustained by a person, who, while entering its station for the purpose of taking a train, is struck and knocked down through the act of the defendant's servant in ejecting a drunken man from the station. *Gray* v. *Boston & Maine Railroad*, 20.

11. In an action against a railroad corporation for personal injuries occasioned to the plaintiff while entering its station, if he testifies that he had travelled over the defendant's road for fifteen years, that he had passed through this entrance a great many times, and that, after the accident, he was helped to the waiting room and took the train for home, it may be inferred, in the absence of anything to the contrary, that he was within the defendant's implied invitation to enter there. *Ibid.*

12. In an action against a railroad corporation for injuries sustained by a person while entering its station, through the act of its servant in ejecting a drunken man from the station, if there is evidence tending to show that the servant was employed specially for the purpose of keeping the men's waiting room and closet clean and in proper condition, and that it was a part of his duty to keep the room and closet free from loafers, the jury may find that, in ejecting the drunken man, he was engaged in doing what he was employed to do, and, if this was so, the defendant may be held responsible, even although the servant may have exceeded his detailed instructions; and, in the absence of anything to show the contrary, or of any question raised upon the point at the trial, it may be inferred that the drunken man was found in the men's waiting room or closet rather than in one of the other rooms opening from the corridor where the accident occurred. *Ibid.*

13. A person who goes to a tenement, not on any business in which his brother, the tenant, whom he goes to see, is engaged, but for the purpose of borrowing money, it not appearing that the brother ever held himself out as lending money or that he ever lent money, there being *no previous* appointment to call and no previous notice of his intention to call having been given, is a mere licensee, and cannot recover from the owner of the

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tenement for injuries received by falling on a formation of ice caused by the dripping of water from defective gutters and conductors on a flight of stairs used in common by the tenants. *Ganley* v. *Hall*, 513.

14. If horses, which an express company contracts with the owner to transport upon railroads from one State to another, are kept in the car without food, drink, and rest for forty-nine hours, in violation of U. S. Rev. Sts. §§ 4386–4390, the railroad corporation and the company's agent, who knows that the car is being delayed for several hours at an intermediate point, and is requested by the custodian of the horses to unload them for feed and water, are guilty of gross negligence, for the consequences of which the express company is liable in an action by the owner. *Brockway* v. *American Express Co.* 257.

15. In an action for personal injuries it appeared that the defendant corporation had a two-story permanent stage extending from its warehouse to the edge of a wharf; that it had a swinging stage, made of heavy planks bolted together strongly by cross-pieces, which was used in connection with the permanent stage, and was run over the decks of vessels, one end resting on the permanent stage, and the other being supported by the ropes fastened to the masts of vessels, from which their cargoes were discharged by being hoisted and delivered upon trucks standing near the outer end of the swinging stage, and thence wheeled into the warehouse; that, while the plaintiff was engaged by the defendant in this work of trucking, a rope which held one corner of the swinging stage, and which was fastened to one of the masts of a vessel, broke, and the stage gave way, and the plaintiff was injured; that the captain of the vessel raised the freight from the hold by tackle and slings, and lowered it into the defendant's trucks, which were about four feet from the outer end of the swinging stage; that the captain employed a stevedore to stand on the swinging stage, manage it, receive the bags and lower them into the trucks; that the ropes and tackle were furnished and operated by the captain and crew of the vessel, and the defendant did nothing in reference to them, and that several hours before the staging fell the defendant's foreman, who had engaged the plaintiff and another laborer, told them, "As soon as the stageman is ready, have your trucks ready to go out." *Held*, that it was properly ruled that the action could not be maintained against the defendant, but that it did not follow that the plaintiff was without remedy against the owners of the vessel. *Moynihan* v. *King's Windsor Cement Dry Mortar Co.* 450.

See Action, 6–9; Conflict of Laws; Damages, 2–5; Employers' Liability Act; Evidence, 6–8, 15; Exceptions, 8, 9; Guardian and Ward, 2; Landlord and Tenant; Master and Servant; Notice; Power.

NEGOTIABLE INSTRUMENTS.

A certificate of stock, although indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, is not a negotiable security. *O'Herron* v. *Gray*, 573.

See Check; Guardian and Ward, 2; Promissory Note.

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NEW TRIAL.

If a verdict is ordered for the defendant in an action upon the facts agreed at the trial, the plaintiff's offer of proof, and the evidence, and there is a view of the evidence which, in connection with the facts agreed and offered in proof, would have justified a verdict for the plaintiff, a new trial will be ordered. *Rogers* v. *Evangelical Baptist Benevolent & Missionary Society*, 592.

NOTICE.

In an action against a town for personal injuries occasioned by a defect in a highway, a notice by the husband of the plaintiff to the selectmen of the time, place, and cause of the injury will be regarded as sufficient, if it can be gathered from its terms and from the circumstances of the parties that it was signed and given by the husband in behalf of his wife. *Higgins* v. *North Andover*, 251.

See Bond, 2, 3; Contract, 10; Evidence, 1; Exceptions, 2, 3; Forcible Entry and Detainer, 2; Guaranty, 2; Negligence, 13, 14; Partnership, 1; Promissory Note, 1; Street Railway; Trust and Trustee, 3.

OFFICE.

See Attorney at Law.

OFFICER.

See Arrest.

ORDINANCE.

See Petroleum.

PARENT AND CHILD.

If a child, having been taken away from his father, without right, by the mother, who has married another man, voluntarily elects, when the choice is given him, to stay with his mother in her new home and her husband chooses to receive him, the husband has no right, without communicating with the father, to look to him for the child's support. *Foss* v. *Hartwell*, 66.

PARTIES.

If land is conveyed in trust for a cemetery corporation, the trustees are the proper parties to bring a petition for a jury to assess the damages caused by a railroad corporation taking a portion of the land. *Packard* v. *Old Colony Railroad*, 92.

See Evidence, 20; Goods Sold and Delivered; Insolvent Debtor, 1; Reservation, 1.

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PARTITION.

See Removal of Suits.

PARTNERSHIP.

1. A release by one partner of a debt due to the firm, after the debtor has notice of the dissolution of the firm and has been notified also that any settlement must be made with both partners together, is a bar to an action by both to recover the debt. *Gordon* v. *Albert*, 150.
2. A partnership composed of A., B., and C., under the name of A., B., and Company, was dissolved, and a limited partnership under the same name was formed, A. being named as special partner, and B. and C. as general partners. The provisions of law relating to limited partnerships were complied with, and the new firm succeeded to the business of the old. *Held*, in an action against A. on a promissory note given by B. in the firm's name, without the knowledge of A. or C., that by Pub. Sts. c. 75, as modified by St. 1887, c. 248, the name of A. could form part of the name of the limited partnership without making him liable as a general partner. *Groves* v. *Wilson*, 370.
3. A partnership association formed under the laws of Pennsylvania contained in Brightly's Purdon's Digest, (12th ed.) 1086–1088, is not a corporation, and cannot be sued here as such. *Edwards* v. *Warren Linoline & Gasoline Works*, 564.

See Action, 1; Evidence, 18; Goods Sold and Delivered.

PART OWNERS.

See Action, 1; Ships and Shipping, 2.

PASSENGER.

See Evidence, 14; Negligence, 5–8.

PAYMENT.

See Check, 3; Evidence, 13; Fees.

PERSONAL PROPERTY.

See Amendment, 1; Contract, 9; Conversion; Damages, 1; Evidence, 18.

PETROLEUM.

The superstructure of a building in a city used for the storage, refining, etc. of crude petroleum or its products having burned down, it appeared that

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the value of the sills, girders, and piling that remained in the erection of a new building was $1,200 for the piling and about $250 for the flooring, and that the cost of the original superstructure was $3,000, but that the estimated cost of restoring it was a little less. *Held*, that the proceeding to restore it was not the erection of a new building, but the repairing of an old one, and that it was not necessary to take out a license under St. 1894, c. 399, entitled "An Act concerning the storage of petroleum or any of its products, and the erection and use of buildings therefor," or a permit under a city ordinance which required such permit except in the case of necessary repairs. *Somerville* v. *Walker*, 388.

PLEADING.

See EMPLOYERS' LIABILITY ACT, 7; EQUITY, 5; INSOLVENT DEBTOR, 4; JUDGMENT; MECHANIC'S LIEN, 2–4, 7; WRIT OF ERROR.

PLEDGE.

A guardian deposited a certificate of stock owned by and standing in the name of his ward in a bank for safe keeping, and subsequently borrowed money from the bank for his personal use, for which he gave his note and indorsed his ward's certificate in blank "A., by B., Guardian," and deposited it as collateral security for the payment of his note. The note was afterward paid by the guardian, but before its payment, C., the cashier of the bank, fraudulently pledged the certificate as security for his personal debt to D., who took it without notice of C.'s want of authority to pledge it, and supposing him to be in rightful possession thereof. D. then took the certificate to the office of the company issuing it, and asked for a transfer of the stock and for a certificate thereof in his own name, and upon the refusal of the company to make the transfer without the authority of the Probate Court, C., at the request of D., on a petition signed "B., Guardian, by C.," of which neither the guardian nor ward had any knowledge, by publication or otherwise, procured such a decree, and the stock was transferred and a new certificate thereof issued to D. *Held*, that the ward was entitled to a decree against D. for the transfer and delivery of the certificate of stock, and the payment of all the dividends received thereon by D., and, since there was no privity between the bank and D., the fact that the bank was paying the expenses of the plaintiff's litigation is immaterial. *O'Herron* v. *Gray*, 573.

See ASSIGNMENT, 2, 3; GUARANTY; GUARDIAN AND WARD, 2.

POLICE COURT.

See RECOGNIZANCE, 2.

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POOR DEBTOR.

1. A poor debtor, who has entered into a recognizance to deliver himself up for examination, is not excused from appearing at the time fixed for the examination by the fact that he had begun proceedings in insolvency earlier on that day. *Demelman* v. *Hunt*, 102.
2. A discharge in insolvency of the principal in a poor debtor's recognizance is a bar to an action thereon against him for a breach occurring before the discharge, but, under Pub. Sts. c. 157, § 85, does not release a surety on the recognizance. *Ibid.*

POST OFFICE.

See BENEFICIARY ASSOCIATION, 5; EVIDENCE, 1.

POWER.

1. One who is entitled to execute a power of sale by which the interests of others will be affected, is bound to exercise not only good faith, but reasonable care and diligence, and, if others are injured by the negligent exercise of the power, they may appeal to equity for redress. *Price* v. *Bassett*, 598.
2. To sell land, given by will to A. for life with power to sell any part of it if needed for his support, with a devise over of what remains at his death to B., for less than half its market value, the land being in active request, and at a sacrifice of more than two thousand dollars, without taking any steps or making any effort to find whether the price for which he sold was reasonable, or was the fair market value, or whether he could get more, and to do this advising only with the purchaser's agent, is, as matter of law, negligence on the part of A. in executing his power; and B. is entitled to equitable relief. *Ibid.*

See ACTION, 4; MORTGAGE.

PRACTICE.

See AMENDMENT; APPEAL; ATTORNEY AT LAW; BOND, 1; COSTS; DEPOSITION; EQUITY, 5–9; EXCEPTIONS; EXECUTION; FEES; INSOLVENT DEBTOR; JUDGMENT; MANDAMUS; MASTER IN CHANCERY; NEW TRIAL; RECOGNIZANCE; REMOVAL OF SUITS; SUPERIOR COURT; SUPREME JUDICIAL COURT; SURVIVAL OF ACTIONS; TRIAL; VERDICT.

PRESCRIPTION.

See ESTOPPEL, 2.

PRESUMPTION.

See CORPORATION, 4, 5; MALICIOUS PROSECUTION, 2; WORK AND LABOR.

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PRINCIPAL AND AGENT.

See CONTRACT, 3; CORPORATION, 2, 3, 8; EVIDENCE, 19, 20; HUSBAND AND WIFE, 3; INSURANCE, 1; MONEY HAD AND RECEIVED; SHIPS AND SHIPPING, 2.

PRINCIPAL AND SURETY.

See ADMISSIONS; BOND; POOR DEBTOR, 2.

PRIORITY.

If a mortgagee of land takes the mortgage in good faith and for value, relying upon the discharge of a prior mortgage and the title as it appears in the registry, and does not demand production of the discharged mortgage or the mortgage note, which are then outstanding in the hands of an assignee under an unrecorded assignment, the latter cannot maintain a bill in equity against the former to establish the invalidity of the discharge and the priority of the earlier mortgage. *Swasey* v. *Emerson*, 118.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROBATE COURT.

Where there is property or a fund or right of action which cannot otherwise be made available, it is competent for the Probate Court to appoint an administrator for the sole purpose of collecting and receiving assets which will not be general assets of the estate of his intestate, or liable for his debts, but which will belong to particular persons who by law or by contract with the deceased will be entitled thereto, and it is also competent for that court to entertain jurisdiction of the settlement of the accounts of such administrator; at least when he has not been called to account by other judicial proceedings instituted before the jurisdiction of the Probate Court for this purpose is sought. *Sargent* v. *Sargent*, 420.

See ESTATES OF PERSONS DECEASED, 2.

PROCESS.

See ARREST, 1; FEES, 2.

PROHIBITION.

See INSOLVENT DEBTOR, 1.

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PROMISSORY NOTE.

1. Though a person who indorses a note before delivery to the payee is entitled to notice as an indorser under the Pub. Sts. c. 77, § 15, he is in all other respects a co-maker, and cannot, under the Pub. Sts. c. 168, § 8, file a declaration in set-off for a debt due to himself alone. *Brooks* v. *Stackpole*, 537.
2. In an action by the holder of a promissory note against the payee who indorsed it, the latter has no ground of exception to a refusal to rule that, upon all the evidence, the plaintiff is not entitled to recover, if it is competent for the judge trying the case without a jury to find upon the evidence that the plaintiff purchased the note, in good faith, for value before its maturity, and the judge so finds. *Briggs* v. *Cushing*, 71.
3. The maker of a promissory note cannot, as against an indorsee before maturity, for value, and without knowledge or notice of any defence thereto by the maker, recoup the damages by him sustained in consequence of a breach of warranty by the payee in the sale of merchandise to the maker in payment for which the note was given. *Holden* v. *Phœnix Rattan Co.* 570.
4. In an action by an indorsee against the maker of a promissory note, upon which there has been a want or failure of consideration in whole or in part, the production of the note by the indorsee and the proof or admission of the genuineness of the signatures make out a *prima facie* case in his favor, which is not met merely by proof of a want or a failure of consideration, but the burden of also introducing evidence that the indorsee did not take the note in good faith for value before maturity is on the defendant. *Ibid.*
5. If a promissory note is discounted by a bank for the payee before maturity without any knowledge that the maker of the note has any defence to it as against the payee, to whose credit in his account with the bank the proceeds are passed, in an action on the note by the bank against the maker, evidence that the payee "ceased to be a depositor" in the bank on a date before the maturity of the note will justify the inference that at that time he closed his account with the bank, and a finding for the plaintiff is warranted. *Fulton National Bank* v. *Gosline*, 86.

See FALSE REPRESENTATIONS; GUARANTY.

PUBLIC CHARITY.

1. A bequest to trustees for the purpose of purchasing a lot and building a chapel in the town of C., in Ireland, to "forever be used for purposes of public worship under the auspices of the Roman Catholic Church," is a gift for a public charitable use. *Teele* v. *Bishop of Derry*, 341.
2. The fact that a charity is to be administered in a foreign country does not of itself render it invalid. *Ibid.*
3. The fact that a bequest is in the nature of a public charity does not require of itself that the court should frame a scheme to carry it out as near as may be to the purpose of the testator, if, for any reason, that

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has become impossible of performance in the manner which he has provided. *Teele* v. *Bishop of Derry*, 341.

4. If a charitable purpose is limited to a particular object or to a particular institution, and there is no general intent, then if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of *cy pres* does not apply, and, in the absence of any limitation over, or other provision, the legacy lapses. *Ibid.*

PURCHASER FOR VALUE.

1. A., the owner of a vessel, conveyed the same by a recorded bill of sale to B. as security for a debt, and B. subsequently conveyed it to C. on payment by him of A.'s debt. C. also paid the vessel's bills, and the two sums together amounted nearly to what the vessel would have brought on a forced sale. The vessel, which was insured, was subsequently lost, and D., to whom A. was indebted, brought a bill in equity under Pub. Sts. c. 151, § 2, cl. 11, against A., C., and the company by which the vessel was insured, to reach and apply the insurance money in payment of his debt. *Held*, that, as C. was a *bona fide* purchaser for value, and as it did not appear that A. had any interest in the policy, the bill was properly dismissed. *Boston Marine Ins. Co.* v. *Proctor*, 498.

2. An investment company assigned to a trust company certain mortgage deeds and notes to secure debenture bonds of the former, and, by an agreement between them, the assignments of the mortgages were not recorded. The investment company subsequently discharged these mortgages without the knowledge of the trust company, and these discharges were recorded. The investment company afterwards took new notes secured by new mortgages upon the respective pieces of land covered by the former mortgages; and these notes were sold to A. before maturity. *Held*, that A. was entitled, as against the trust company, to have the new mortgages assigned to him. *Commonwealth* v. *Globe Investment Co.* 80.

See CHECK, 2; PRIORITY; PROMISSORY NOTE, 2, 4.

QUARANTINE.

See ANIMAL.

QUIETING TITLE.

A quitclaim deed, duly recorded, of land acquired in part by disseisin, which the grantor has a good right to convey, gives to the grantee a "record title" to the whole estate, within the meaning of St. 1893, c. 340, § 1, relating to quieting titles to real estate. *Connolley, petitioner*, 201.

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RAILROAD.

See ACTION, 5; DAMAGES, 3, 5; ESTOPPEL, 2; HUSBAND AND WIFE, 4; MASTER AND SERVANT, 3, 9, 16–19; NEGLIGENCE, 6–12, 14; PARTIES; WORK AND LABOR.

REAL ESTATE.

See ACTION, 5; CONTRACT, 9; CORPORATION, 1, 4, 6, 7; DAMAGES, 1; DEVISE AND LEGACY; EQUITY, 1, 2; ESTATES OF PERSONS DECEASED, 2; FORCIBLE ENTRY AND DETAINER; HUSBAND AND WIFE, 1; LANDLORD AND TENANT; MECHANIC'S LIEN, 5; MORTGAGE; PURCHASER FOR VALUE, 2; QUIETING TITLE; TENANT AT WILL; TITLE.

RECEIPT.

See EVIDENCE, 19.

RECEIVER.

See GOODS SOLD AND DELIVERED.

RECOGNIZANCE.

1. A married woman may enter into a recognizance. *Commonwealth* v. *Abbott*, 471.
2. It is no defence to an action on a recognizance in the Superior Court that one substantially similar in all respects had been entered into by the parties before the police court from which the appeal was taken. *Ibid.*

See EXECUTION; MANDAMUS; POOR DEBTOR.

RECORD.

See CORPORATION, 7, 8; MANDAMUS.

RECOUPMENT.

See CONDITION; PROMISSORY NOTE, 3.

REDEMPTION.

At the same time with the making of a mortgage of land conditioned for the payment of $2,200 and interest, an agreement under seal was executed by the mortgagor and mortgagee, by which, after referring to the mortgage, the former agreed to finish a house on the mortgaged land, the latter agreed to furnish the material, and the former covenanted to pay the cost

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of the material and $1,100 for the land; and it was then provided that the cost of the estate and the cost of the material, "whether more or less than said twenty-two hundred dollars shall be received in payment of said note and in discharge of said mortgage." *Held*, that the mortgagor was entitled to redeem the premises from the mortgage on paying the sum mentioned therein, although the sum due under the agreement was much larger. *Ford* v. *Davis*, 116.

See ACTION, 3; EQUITY, 1.

REGISTRY OF DEEDS.

See PRIORITY; PURCHASER FOR VALUE, 2.

RELEASE.

See GUARANTY, 2; PARTNERSHIP, 1; WAGER.

REMAINDER.

See DEVISE AND LEGACY; POWER, 2.

REMOVAL OF SUITS.

The St. 1892, c. 169, entitled "An Act relative to the jurisdiction of the Supreme Judicial and Superior Courts in real actions," takes away the right of removal from the Superior Court to the Supreme Judicial Court of all actions at law and of petitions for partition which previously could have been so removed under Pub. Sts. c. 152, §§ 7, 8. *Bliss* v. *Hurd*, 463.

RENT.

See TENANT AT WILL.

REPEAL.

See SEWER, 3.

REPORT.

See EQUITY, 6–9; ESTOPPEL, 2; EVIDENCE, 9–13; EXCEPTIONS, 5; MASTER IN CHANCERY; WATER COMPANY, 1.

RESERVATION.

1. The reservation of an easement to one not a party to the deed is void. *S. K. Edwards Hall Co.* v. *Dresser*, 136.
2. If a deed of land reserves to the grantor a right of way over it, unless the grantee shall provide some other and convenient way over his adjoining

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land in its stead, the subsequent acceptance by the grantee of a deed of other adjoining land containing a reservation to the grantor therein of a right of way over it will not operate as the substitution by the grantee of a new way for the grantor in the first deed. *S. K. Edwards Hall Co.* v. *Dresser*, 136.

RETURN.

See APPEAL.

REVERSION.

See CORPORATION, 7.

REVIEW.

See JUDGMENT.

REVOCATION.

See CONTRACT, 2; SHIPS AND SHIPPING, 2.

RULE OF COURT.

See EQUITY, 7, 9; EXCEPTIONS, 1; SUPERIOR COURT.

SALE.

See ACTION, 4; CONTRACT, 4; EVIDENCE, 1, 22; INTOXICATING LIQUORS; LAW AND FACT; MONEY HAD AND RECEIVED; MORTGAGE; POWER; PROMISSORY NOTE, 3.

SCHOOL.

See ACTION, 2.

SEAMAN.

See SHIPS AND SHIPPING, 1.

SELECTMEN.

See TOWN.

SENTENCE.

See ASSAULT.

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SERVICE.

See APPEAL; EXCEPTIONS, 4; FORCIBLE ENTRY AND DETAINER, 2.

SET-OFF.

See PROMISSORY NOTE, 1.

SEWER.

1. The superintendent of streets of a city was ordered by the mayor and aldermen to make a sewer in a certain street, "said sewer to be of 15 inch and 12 inch earthen pipe and located as shown on a plan on file" in his office. According to the plan a portion of the sewer was to be built of 24 inch pipe. *Held*, on a petition for a writ of certiorari to quash an assessment for the cost of the sewer, that the order and plan were to be taken together; and that there was no error on the part of the superintendent of streets, or failure to comply with the order, in building a portion of the sewer of 24 inch pipe. *Bowditch* v. *Boston*, 239.
2. The neglect of the superintendent of streets of Boston, who is ordered by the mayor and aldermen, under the authority of St. 1892, c. 402, to build a sewer in a certain street, to invite by advertisement proposals for its construction, and to take a bond or other security for the performance of the contract, as required by St. 1890, c. 418, §§ 4–6, the estimated cost of the same having exceeded $2,000, renders an assessment upon the estates abutting on the street for the cost of the sewer invalid. *Ibid.*
3. The writing of "Approved" by the mayor on a letter written by the superintendent of streets of Boston asking the mayor's approval of his action in letting the contract for the construction of a sewer ordered by the mayor and aldermen to be built, under the authority of St 1892, c. 402, and the estimated cost of which exceeds $2,000, without advertising for proposals or taking security for the performance of the contract, is not a compliance with St. 1890, c. 418, §§ 4–6; and the latter statute is not repealed by St. 1892, c. 402. *Ibid.*

See CERTIORARI.

SHIPS AND SHIPPING.

1. Under Art. 13 of the treaty between the United States and the Kingdom of Sweden and Norway of 1827, 8 U. S. Sts. 346, 352, the courts of this country have no jurisdiction of an action for wages, brought by a seaman against the master of a Norwegian vessel. *Tellefsen* v. *Fee*, 188.
2. At the trial of an action by A against B., a part owner of a schooner, for labor and supplies furnished in fitting her out for a fishing voyage, it appeared that A. was employed by C., who was another part owner and had been for several years the managing owner; that before the labor and supplies were furnished B. gave notice to C. not to incur any further ex-

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pense on the schooner on his account; that A. did not know of this; and that B. gave no notice, except to C., of his intention not to join in the enterprise for which the schooner was fitted. B. knew of the fitting, but it did not appear that he knew that A. was furnishing the labor and supplies, nor did it appear that A. had had any previous dealings with C., and there was no evidence of his knowledge of C.'s relation to the vessel. *Held*, that the action could not be maintained. *Atkins* v. *Lewis*, 534.

See ACTION, 1; EVIDENCE, 8; NEGLIGENCE, 15; PURCHASER FOR VALUE, 1.

SIGNATURE.

See PROMISSORY NOTE, 4.

SPECIFICATION.

See ATTORNEY AT LAW, 3; EQUITY, 9.

SPECIFIC PERFORMANCE.

See AMENDMENT, 2.

STATUTE.

See AMENDMENT, 1; ANIMAL; ASSAULT; ASSIGNMENT, 3; ATTORNEY AT LAW, 1, 2; BENEFICIARY ASSOCIATION, 1, 3, 4; CAPE COD SHIP CANAL; CERTIORARI; CONTRACT, 7; CORPORATION, 4; COSTS; DAMAGES, 2; DEPOSITION; DIVORCE, 5, 6; EMPLOYERS' LIABILITY ACT, 1, 3–8; EVIDENCE, 11–13, 16, 22; EXCEPTIONS, 4; FEES; FORCIBLE ENTRY AND DETAINER; HUSBAND AND WIFE, 1; INSOLVENT DEBTOR, 1–6; INSURANCE, 1; JUDGMENT; LAW AND FACT; MASTER AND SERVANT, 5–7; MECHANIC'S LIEN, 1, 2; NEGLIGENCE, 8, 14; PARTNERSHIP, 2, 3; PETROLEUM; POOR DEBTOR, 2; PROMISSORY NOTE, 1; PURCHASER FOR VALUE, 1; QUIETING TITLE; REMOVAL OF SUITS; SEWER, 2, 3; STREET RAILWAY; TITLE; WAGER; WATER COMPANY.

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STOCK-JOBBING.

See INSOLVENT DEBTOR, 6; WAGER.

STREET.

See CERTIORARI; COSTS; DAMAGES, 2; NEGLIGENCE, 9; NOTICE; SEWER; STREET RAILWAY.

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STREET RAILWAY.

A street railway is entitled to the notice required by Pub. Sts. c. 52, § 19, to be given to the "county, town, place, or persons by law obliged to keep said highway . . . in repair," as a condition precedent to the right to sue it given by § 18, for injuries caused by a defect in the highway between the railway tracks due to its neglect of its obligation to repair, imposed by Pub. Sts. c. 113, § 32. *Dobbins* v. *West End Street Railway*, 556.

See ACTION, 9; EVIDENCE, 14; NEGLIGENCE, 3–5.

SUBROGATION.

See INSURANCE, 6.

SUBSCRIPTION.

See CONTRACT, 5.

SUPERIOR COURT.

Under the 27th Rule of the Superior Court, it is within the power of that court to enter judgment in an action in which the defendant has been defaulted on the first Monday of the following month, although it is within four legal days after the default. *Bailey* v. *Edmundson*, 297.

See AMENDMENT, 1; APPEAL; COSTS; EQUITY, 1; EXCEPTIONS, 4; INSOLVENT DEBTOR, 4; MECHANIC'S LIEN, 2; RECOGNIZANCE, 2; REMOVAL OF SUITS; SUPREME JUDICIAL COURT, 1.

SUPREME JUDICIAL COURT.

1. If the finding of a master to whom a suit in equity has been referred is confirmed by the Superior Court, it will not be reversed by this court, unless it clearly appears to be erroneous. *S. K. Edwards Hall Co.* v. *Dresser*, 136.
2. The finding of a judge presiding at the trial, that a witness was not qualified to express an opinion, is not open to revision by this court, the examination of the witness not having been reported. *Kenneson* v. *West End Street Railway*, 1.

See APPEAL; EXCEPTIONS; REMOVAL OF SUITS; WRIT OF ERROR.

SURETY.

See ADMISSIONS; BOND; POOR DEBTOR, 2.

SURPLUSAGE.

See EMPLOYERS' LIABILITY ACT, 7.

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SURVIVAL OF ACTIONS.

If, pending an action against several defendants sued on a joint contract, one of them dies, a ruling that the action may proceed against the survivor is correct. *Tucker* v. *Utley*, 415.

SWEDEN AND NORWAY.

See Ships and Shipping, 1.

TAKING.

See Action, 5; Evidence, 23; Parties.

TAX.

See Equity, 1; Evidence, 10.

TELEGRAPH.

See Contract, 1, 2.

TENANT AT WILL.

At the trial of an action for rent it appeared that the defendant was a tenant at will of the plaintiff, at a certain monthly rental "payable after the termination of each month of the tenancy"; that the agreement was made on September 15, 1894, and by its terms the defendant forthwith entered upon his tenancy; that on October 14, 1895, at 2.30 P.M., the plaintiff conveyed the premises to a third person, with an understanding between them, unknown to the defendant, that he should occupy until he should receive one month's notice to quit, and that he remained in possession during the month for which the action was brought. *Held*, that the conveyance by the plaintiff terminated the tenancy at will, and that the action could not be maintained. *Hammond* v. *Thompson*, 531.

TENANTS IN COMMON.

See Ships and Shipping, 2.

TENDER.

See False Representations, 2.

TITLE.

A petition, under St. 1882, c. 237, to relieve real estate of the encumbrance of an undischarged mortgage cannot be maintained where, within twenty

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years after the time therein limited for the performance of its conditions, the mortgagor recognizes the existence of the mortgage by a letter written to the mortgagee referring to the mortgage debt and promising payment thereof in time, and later, by buying back from his assignees in bankruptcy the equity of redemption in the mortgaged real estate. *Brintnall* v. *Graves*, 384.

See CONTRACT, 9; CORPORATION, 6, 7; EVIDENCE, 23; MONEY HAD AND RECEIVED.

TORTS.

See ACTION, 6–9; DAMAGES, 2–6; EMPLOYERS' LIABILITY ACT; EVIDENCE, 5–8, 15; EXCEPTIONS, 8, 9; HUSBAND AND WIFE, 4; LANDLORD AND TENANT; MASTER AND SERVANT; NEGLIGENCE; NOTICE.

TOWN.

A town may, at an adjourned annual town meeting, reconsider a vote passed on the first day of the meeting fixing the number of selectmen, and may then vote to enlarge the number and elect additional selectmen in pursuance of such vote. *Attorney General* v. *Dole*, 562.

See ANIMAL; EVIDENCE, 22; INTOXICATING LIQUORS; NOTICE.

TRADEMARK.

A. organized an orchestra, giving it a certain name, and hired and paid the members of it. He afterwards sold to B. all his right, title, and interest in and to the organization, "together with all rights acquired in and to the establishment, name, and trademark in the words" composing the name, and then ceased to have any connection with it. The other members of the orchestra were not parties to the contract, and did not agree to continue to play under the management of B., but subsequently withdrew from the organization, and with others formed a corporation under the name invented by A. *Held*, that B. could not maintain a bill in equity to restrain the use of such name. LATHROP, J., dissenting. *Messer* v. *The Fadettes*, 140.

See EQUITY, 4.

TREATY.

See SHIPS AND SHIPPING, 1.

TRESPASS.

See ACTION, 6; NEGLIGENCE, 10–18.

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TRIAL.

1. It is within the discretion of the judge presiding at the trial to decline to reopen a case for the further examination of a witness. *Brittain* v. *West End Street Railway*, 10.
2. At the beginning of the trial of a criminal case, the judge, at the defendant's request, excluded the witnesses on both sides from the court room. B., who had taken notes at a former trial of the case, remained in court taking notes of the testimony as an assistant to the defendant's counsel. The trial lasted for two and one half days, the larger part of which was occupied by the government in putting in its case; and the government's witnesses were inquired of by the defendant's counsel if they had not testified at the previous trial differently from what they testified at this, and, when putting these questions, he apparently read from the notes of the previous trial, stating especially in each question facts at variance with those last testified to. He then called B. as a witness for the purpose of contradicting a witness for the government, by testifying that the latter's testimony on material points at the former trial had been different from that given at the present trial; and stated that, when the witnesses were excluded from the court room, he did not know that it would be necessary to call B. *Held*, that it was within the discretion of the judge to exclude the testimony of B. *Commonwealth* v. *Crowley*, 121.
3. There is no error in allowing the district attorney, in his argument to the jury at the trial of an indictment for manslaughter, to make the statement that "the defendant upon these facts might well have been indicted for the crime of murder," if there is no statement by him of any fact not in evidence and no misstatement of the evidence. *Ibid.*

See ASSIGNMENT, 2; EVIDENCE, 15, 21; EXCEPTIONS, 5–7, 9–12; JURY; NEW TRIAL; SUPREME JUDICIAL COURT, 2.

TRIAL JUSTICE.

See LIMITATIONS, STATUTE OF, 1.

TROVER.

See CONVERSION.

TRUST AND TRUSTEE.

1. A deed of land recited that, in consideration of a certain sum paid by three persons named "a committee of and in behalf of" a certain cemetery corporation, the grantor conveyed to such persons, "for the use and behoof of said corporation," the land to be held "in behalf of the said corporation, to their use and behoof forever"; and that the land was free from encumbrances, "except that the ground shall never be used for other purposes than as a cemetery." *Held*, that the deed was to be construed as a

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deed in trust for the corporation, and conveyed a fee, though no words of limitation to heirs were used. *Packard* v. *Old Colony Railroad*, 92.

2. No particular words are required to create a trust; and the absence of the words "in trust" or "trustees" does not negative a trust. *Ibid.*
3. Every grantee of land has notice that there may be a trust outstanding, but he is not called on to inquire about it, unless he has notice that there is one. *Swasey* v. *Emerson*, 118.
4. On a bill in equity for instructions, brought after the death of the testator's widow, as to the duties of the trustee, to whom was bequeathed twenty thousand dollars which was to furnish income and interest to be paid to the testator's surviving son for life after the widow's death, as well as nearly all the rest of the testator's property, the court said that the trustee was to pay over the full income of twenty thousand dollars, which was less than half of the trust estate, for life, that the surplus of income was to be accumulated, and that the ultimate disposal of the fund would not now be determined. *Brown* v. *Wright*, 506.
5. Giving property in trust to carefully manage and invest it necessarily implies that any income is part of the trust fund, and if such income is in excess of the sums which the trustee is directed to pay out before the final termination of the trust, such excess of income must necessarily be held in the trust and accumulate until it can be paid out in accordance with the directions of the testator; and it cannot be said, therefore, that any part of the income is undevised property. *Ibid.*
6. The frequent use of the phrase "interest and income" in a will and codicil does not indicate an intention to direct the payment of interest at the rate of six per cent a year, whether earned or not, on the trust fund in question, and any additional income which the fund may yield. *Ibid.*

See CORPORATION, 7; EQUITY, 2; EVIDENCE, 23; GUARDIAN AND WARD; PARTIES; PLEDGE; POWER; PUBLIC CHARITY.

UNDUE INFLUENCE.

See EXCEPTIONS, 10; WILL, 1.

USAGE.

See EVIDENCE, 14; MONEY HAD AND RECEIVED.

VARIANCE.

See MECHANIC'S LIEN, 4, 7.

VERDICT.

1. It is error to direct a verdict for the plaintiff in an action, although his testimony is uncontradicted, and, if believed, entitles him to recover. *Devine* v. *Murphy*, 249.

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2. A verdict may be taken in the absence of the parties and their counsel, notwithstanding a proclamation of adjournment of the court until the next day has been made. *Tim* v. *Rosenfeld*, 393.

See ASSAULT; NEW TRIAL.

VOTE.

See CONTRACT, 3, 11; CORPORATION, 3, 8.

WAGER.

The St. 1890, c. 437, entitled "An Act relative to wagering contracts in securities and commodities," is a remedial and not a penal statute, and the cause of action given thereby, being the property of the person entitled to sue and no other person having any interest therein, may be discharged by him by a sufficient release under seal. *Wall* v. *Metropolitan Stock Exchange*, 282; *Shea* v. *Metropolitan Stock Exchange*, 284.

WAGES.

See SHIPS AND SHIPPING, 1.

WAIVER.

The waiver of a provision in a written agreement which may be regarded as independent does not affect the mutual and dependent character of other provisions contained in the agreement. *Griggs* v. *Moors*, 354.

See INSURANCE, 3, 4; LIMITATIONS, STATUTE OF, 4, 5.

WARRANTY.

See ACTION, 4; CONTRACT, 9; PROMISSORY NOTE, 3.

WATER COMPANY.

1. Where a rule is given by statute to commissioners to determine the fair value of the property of a water company for the purposes of its use by a city which is authorized to purchase it, the award of the commissioners when accepted by this court to be final, it is proper that the manner in which the rule has been interpreted and carried out should be reported for the supervision of the court before the acceptance of the report of the commissioners. *Newburyport Water Co.* v. *Newburyport*, 541.

2. Under St 1894, c. 474, entitled "An Act to provide for the purchase of the property of the Newburyport Water Company by the city of Newburyport," it is proper that no allowance should be made for the city's right

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to lay and maintain pipes in the streets and its right to collect water rates. *Newburyport Water Co.* v. *Newburyport*, 541.

3. It is within the power of commissioners appointed under a statute to determine the valuation of the property of a water company purchased by a city to award the costs of the reference. *Ibid.*

See EVIDENCE, 9–13.

WAY.

See ESTOPPEL, 2; RESERVATION, 2.

WHARF.

See CONTRACT, 9.

WIDOW.

See BENEFICIARY ASSOCIATION, 3; ESTATES OF PERSONS DECEASED, 1; EXCEPTIONS, 10.

WILL.

1. The appellant from a decree allowing a will is not entitled to have the jury instructed that, if the testator's widow was his mistress to the time of the marriage, and the marriage was brought about for the purpose of unduly influencing him to make a will in her favor, or in accordance with her desire, they would be justified in finding that the will was obtained by undue influence, especially if the will was not beneficial to her; and an instruction, that "in the eye of the law her position at the time the will was made, in reference to the relation to her husband, was precisely the same as that of the most honored wife in the land," is not open to objection. *Maynard* v. *Tyler*, 107.

2. A request for an instruction, at the trial of an appeal from a decree allowing a will, that if the jury should find that, at the time of making the will, the testator was acting under "any hallucination or delusion, or erroneous opinion amounting to delusion," that would be evidence that at that time he was not of sound mind, is properly qualified by the instruction that, "if a person is under an insane delusion in reference to the subject matter, or has an insane delusion concerning a fact which affects his duty and responsibility in preparing a will, if such an insane delusion is proved, that would affect what would otherwise be considered a good will." *Ibid.*

See ATTORNEY AT LAW, 4, 5; DEVISE AND LEGACY; ESTATES OF PERSONS DECEASED, 1; EXCEPTIONS, 10; POWER, 2; TRUST AND TRUSTEE, 4–6.

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WITNESS.

See EVIDENCE, 16, 17; EXCEPTIONS, 9; SUPREME JUDICIAL COURT, 2; TRIAL, 1, 2.

WORDS.

"Actions and petitions." See *Bliss* v. *Hurd*, 463, 464.
"Acts or aids in any manner in negotiating contracts of insurance." See *Pratt* v. *Burdon*, 596.
"And located all as shown," etc. See *Bowditch* v. *Boston*, 239, 242.
"Approved." See *Bowditch* v. *Boston*, 239, 243.
"As its interest shall appear." See *Attleborough Savings Bank* v. *Security Ins. Co.* 147, 149.
"Bill dismissed." See *Merrill* v. *Beckwith*, 72, 74, 75.
"Building." See *Somerville* v. *Walker*, 388, 390.
"Claims for labor performed or furnished in the construction of said canal." See *Crowell* v. *Cape Cod Ship Canal Co.* 157, 162.
"Clerks of the courts shall collect all fees in advance." See *Clemens Electrical Manuf. Co.* v. *Walton*, 304, 308.
"Company." See *Edwards* v. *Warren Linoline & Gasoline Works*, 564, 568.
"Consistent with justice and for the interests of the creditors." See *Hill* v. *McKim*, 100, 101.
"Construction." See *Crowell* v. *Cape Cod Ship Canal Co.* 157, 162.
"Continuation of such laws." See *Barker* v. *Mackay*, 76, 78.
"Contract under which the lien is claimed." See *Savoy* v. *Dudley*, 538, 539.
"Court of record." See *Mead* v. *Bowker*, 234.
"Creditors who have proved their claims." See *Ruffin, petitioner*, 232, 233.
"Day." See *Hammond* v. *Thompson*, 531, 532.
"Declaration for the same cause of action at law." See *Holder* v. *Hillson*, 514, 515.
"Defect in the condition of the . . . machinery." See *Willey* v. *Boston Electric Light Co.* 40, 42.
"Determine the fair value of said property for the purposes of its use by said city." See *Newburyport Water Co.* v. *Newburyport*, 541, 551, 553.
"Domiciled." See *Olivieri* v. *Atkinson*, 28, 29.
"Drunkenness." See *Burt* v. *Burt*, 204, 207.
"Faithful performance of the obligations imposed by this act." See *Crowell* v. *Cape Cod Ship Canal Co.* 157, 162.
"Family." See *Smith* v. *Boston & Maine Railroad Relief Association*, 213, 214.
"Fidelity as well to the courts." See *Boston Bar Association* v. *Greenhood*, 169, 185.
"Future earning capacity." See *Newburyport Water Co.* v. *Newburyport*, 541, 554.
"Gross and confirmed habits of intoxication" (or "drunkenness"). See *Burt* v. *Burt*, 204, 205, 208.

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"Guilty of deceit, malpractice, and other gross misconduct." See *Boston Bar Association* v. *Greenhood*, 169, 182.
"Habitual intemperance" (or "drunkenness"). See *Burt* v. *Burt*, 204, 205.
"Having regard to all the circumstances of the case." See *Chase* v. *Webster*, 228, 230.
"Heirs." See *Packard* v. *Old Colony Railroad*, 92, 96.
"If it appears that such amount is claimed by another party than the plaintiff." See *Dixon* v. *National Life Ins. Co.* 48, 49.
"Interest and income." See *Brown* v. *Wright*, 506, 510.
"In trust." See *Packard* v. *Old Colony Railroad*, 92, 96.
"Intrusted with the duty of seeing that the works and machinery were in proper condition." See *Willey* v. *Boston Electric Light Co.* 40, 43.
"Labor." See *Crowell* v. *Cape Cod Ship Canal Co.* 157, 162; *Mitchell* v. *Packard*, 467, 468.
"Laborer." See *Crowell* v. *Cape Cod Ship Canal Co.* 157, 162.
"Living." See *Howe* v. *Berry*, 418, 419.
"Lord's day." See *Stewart* v. *Thayer*, 519, 521, 522.
"Net earnings." See *Newburyport Water Co.* v. *Newburyport*, 541, 554.
"No suit . . . shall be entered or filed." See *Clemens Electrical Manuf. Co.* v. *Walton*, 304, 307.
"Or other life interest." See *Howe* v. *Berry*, 418, 419.
"Passenger." See *Inness* v. *Boston, Revere Beach, & Lynn Railroad*, 433, 434.
"Preference." See *Weston* v. *Jordan*, 401, 407.
"Record title." See *Connolley, petitioner*, 201, 203.
"Resident." See *Olivieri* v. *Atkinson*, 28, 29.
"Rights." See *Newburyport Water Co.* v. *Newburyport*, 541, 553.
"Said estate (The)." See *Simonds* v. *Simonds*, 144, 146.
"Same (The)." See *Simonds* v. *Simonds*, 144, 146.
"Security." See *Griggs* v. *Moors*, 354, 361.
"Survives." See *Howe* v. *Berry*, 418, 419.
"Taken from the possession of their owners." See *Kenneson* v. *Framingham*, 236, 237.
"Their families." See *Smith* v. *Boston & Maine Railroad Relief Association*, 213, 214.
"To sustain the action for the cause for which it was intended to be brought." See *Merrill* v. *Beckwith*, 72, 76.
"Trustees." See *Packard* v. *Old Colony Railroad*, 92, 96.
"Ways, works, or machinery." See *Willey* v. *Boston Electric Light Co.* 40, 42; *Reynolds* v. *Barnard*, 226, 227; *McKay* v. *Hand*, 270, 273; *Moynihan* v. *King's Windsor Cement Dry Mortar Co.* 450, 452.
"Written authority to do otherwise." See *Bowditch* v. *Boston*, 239, 243.

WORK AND LABOR.

There is no presumption that work not ordinarily bestowed in charity is gratuitously performed, either for natural persons or for corporations, merely because at the time the recipient has no pecuniary resources, especially

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when the work is done for a railroad corporation empowered to construct a railroad for pecuniary gain. *Worthington* v. *Plymouth County Railroad*, 474.

See CONTRACT, 7.

WRIT.

See AMENDMENT, 1; APPEAL; EXCEPTIONS, 4; WRIT OF ERROR.

WRIT OF ERROR.

The plea of *in nullo est erratum* to a writ of error raises only issues of law, and the case should immediately be transferred to the full court, without a hearing by a single justice. *Bailey* v. *Edmundson*, 297.

WRITTEN INSTRUMENTS.

See BOND; CHECK; CONTRACT; COVENANT; EVIDENCE, 1, 2, 18, 23; GUARANTY; MORTGAGE; WAIVER.

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